83-700

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

JOHN A. PAWLAK and JAMES STAFFORD,

Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

v.

CHARLES E. GREENAWALT, *et al.*,
Defendants

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NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the following: Report with recommendations and proposed findings of fact and conclusions of law, all dated January 29, 1982, copies of which are enclosed herewith.

Any party may obtain a review of the magistrate's above proposed determination pursuant to Rule 904.2, M.D.Pa., which provides:

> 904.2 Review of Case-Dispositive Motions and Prisoner Litigation—28 U.S.C. § 636(b)(1)(B).
>
> Any party may object to a magistrate's proposed findings, recommendations or report under subsections 901.4, .5, and .6 of these rules, *supra*, within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Rule 904.1 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

/s/ Raymond J. Durkin
RAYMOND J. DURKIN
United States Magistrate

Dated: January 29, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

v.

CHARLES E. GREENAWALT, *et al.*,
Defendants

Complaint Filed 10/23/78

(Judge Muir)

REPORT OF MAGISTRATE

Before the court is plaintiffs' application for an award of attorneys' fees. (Doc. No. 13).

The Parties

The award of fees and expenses in this case is sought by Public Citizen, Inc. The several individual attorneys, except local counsel, Bruce F. Bratton, Esq., whose time and efforts form the basis for the requested award of attorneys' fees, are employed by Public Citizen Litigation Group. Those attorneys are Paul Alan Levy, principal counsel in this case; Arthur L. Fox, II, and Alan B. Morrison who participated in supervisory capacities; and John Cary Sims, whose participation was limited to the question of the fee award. Public Citizen Litigation Group is not a separate entity, but rather is an arm of Public Citizen, Inc. Public Citizen, Inc., is an umbrella

organization which, in addition to Public Citizen Litigation Group, now has or has had other divisions, including Congress Watch, The Health Research Group, The Critical Mass Energy Product Project, the Reform Research Group, and the Public Citizen Visitors Center, which are funded in whole or in part by Public Citizen, Inc. Public Citizen, Inc., engages in a wide variety of activities including lobbying, publishing, education research, organizing, and litigation. Public Citizen Litigation Group has no by-laws, no board of directors, and has no separate legal identity apart from the Public Citizen, Inc. The Public Citizen Litigation Group's checking account is an account of Public Citizen, Inc., and all of the funding for Public Citizen Litigation Group, with the exception of small amounts of revenues obtained from reimbursement for incidental expenses, is received from Public Citizen, Inc. Most of the expenses incurred in litigation by the Public Citizen Litigation Group are paid for by Public Citizen, Inc., and most expenses of attorneys employed by the Public Citizen Litigation Group are paid by Public Citizen, Inc. The Public Citizen Litigation Group did not in the past, and does not currently, have a separate account for the receipt of attorneys' fees. The individual attorneys employed by Public Citizen Litigation Group will not directly retain any of the attorneys' fees awarded in this case and any fees awarded will be turned over to Public Citizen, Inc. (Doc. No. 181, stip. facts).

Neither of the two plaintiffs in this case, Pawlak and Stafford, have paid any of the fees or expenses necessary to initiate or pursue this litigation, except for two nights lodging and meals for Mr. Levy. If an award of attorneys' fees is made in this case, none of the money will be given to either Pawlak or Stafford. Neither Pawlak nor Stafford will receive any financial benefit from any attorneys' fees awarded to the Public Citizen Litigation Group. However, neither Pawlak nor Stafford will be liable for any of the fees or expenses incurred in this

case in the event the application for an award of attorneys' fees is denied, except that if costs or fees are awarded against plaintiffs, they will be liable. There has been no written fee arrangement between any attorney at the Public Citizen Litigation Group, or Bratton, and plaintiffs. (Doc. No. 181, stip. facts).

The award of attorneys' fees sought in this case breaks down into two parts. Plaintiffs seek an award against the International Brotherhood of Teamsters (IBT) on the basis of matters litigated under Count I in this action, but *not* Count II. They also seek an award of fees against defendants Charles E. Greenawalt and Teamsters Local Union No. 764 (Local 764), related to matters litigated under Count II of the complaint, but *not* Count I. With respect to the application for the latter award, the parties entered into a partial settlement which provided, in pertinent part, that attorneys' fees and costs of a stated amount would be awarded if, and only if, the court should determine that plaintiffs were the prevailing parties on Count II and that the litigation of Count II created a substantial common benefit for the local membership. The partial settlement also provided that certain additional amounts could be awarded if the court determines that plaintiffs are entitled to counsel fees from the IBT attributable to their efforts in pursuing the fee application, and to that extent, the partial settlement agreement was contingent upon matters in issue on plaintiffs' application for an award of attorneys' fees against the IBT. (Doc. No. 178 and atts.). Thus, the application for an award of fees against the IBT will first be considered, and the background of this action which will be initially set forth will relate primarily to the matters litigated in connection with Count I.

I

John Pawlak, a member of Local 764, filed a previous action in this court contesting a change in the working

conditions at his place of employment. He alleged that Local 764 had violated its duty of fair representation by failing to process his grievance concerning the change in conditions which he alleged were imposed by the employer in violation of the collective bargaining agreement. The court dismissed the complaint on the ground that Pawlak had not exhausted internal union remedies before filing suit. Pawlak v. Teamsters, Local 764, M.D. Pa. 1977, 444 F. Supp. 807, *aff'd. mem.* 3 Cir. 1978, 571 F. 2d 572.

Pawlak then attempted to pursue his grievance through the Union's internal channels, but his charges were dismissed by the Executive Board of Local 764, and he did not pursue them further. Thereafter, Local 764 filed internal charges against Pawlak, accusing him of violating Article XIX, Sec. 6(1) and 12(b) of the Constitution of the IBT. Specifically, Pawlak was charged with having sued Local 764 without exhausting internal remedies, thereby causing the Union to expend $2,635.00 defending the suit. Following a hearing before the Local Union Executive Board, Pawlak was fined the sum of $2,635.00. On appeal, both the Joint Counsel and General Executive Board of the Union affirmed the imposition of the fine.

Pawlak and James Stafford, also a member of Local 764, then filed the instant action against Local 764; Charles Greenawalt, President of the Local; the Teamsters' Joint Counsel; and the IBT. The complaint challenged the validity of the fine on the grounds that (1) the fine unlawfully limited Pawlak's right to sue under the Labor & Management Reporting Disclosure Act (LMRDA), § 101(a)(4), 29 U.S.C.A. § 411(a)(4), and (2) Pawlak had been denied a fair hearing by the Union tribunals. Pawlak and Stafford also sought injunctive relief against enforcement of § 12(b) of the Constitution of the IBT, an order requiring that notice of the decision

be published in the monthly *International Teamsters Magazine*, and punitive damages.

The court denied a motion by Local 764 and Greenawalt to dismiss Pawlak's complaint, although it did dismiss the fair hearing allegations. Pawlak v. Greenawalt, M.D. Pa. 1979, 464 F. Supp. 1265. Local 764 then filed a counterclaim seeking an order directing Pawlak to pay the fine of $2,635.00 that had been imposed. IBT was not a party to that counterclaim. All parties thereafter moved for summary judgment with respect to Count I.

The court held that Article XIX, § 12(b), which provides that if a union member institutes a court action without exhausting internal remedies and is unsuccessful, the Local may recover all costs and expenses incurred by the union in defending the action, is a limit on Pawlak's right to institute a court action and was, thus, in violation of 29 U.S.C.A. § 411(a)(4), and was invalid. The court, therefore, enjoined defendants from collecting the fine and enforcing § 12(b) of Article XIX of the IBT Constitution. The court also granted plaintiffs' motion that the court's order be publicized in an appropriate manner, with a view toward notifying all locals and members of the court's decision. The publication was ordered because the existence of § 12(b) had a chilling effect on the exercise of members' rights to file suit. Pawlak v. Greenawalt, M.D. Pa. 1979, 477 F. Supp. 149. This decision was affirmed. Pawlak v. Greenawalt, 3 Cir. 1980, 628 F. 2d 826. Subsequently, the instant application for an award of attorneys' fees was filed. After discovery was had, an evidentiary hearing was held, certain additional evidence was subsequently received, and post-trial closing argument and reply briefs were filed.

Before discussing the various arguments, the hours claimed to have been expended on Count I and chargeable to IBT are as follows:

TIME THROUGH MAY 27, 1981

	Levy pre-1/1/80	Levy post-1/1/80	Fox	Morrison	Bratton	Sims
Time spent on Count I only	64-1/4	38	9	17-1/2		
Time spent on both Counts	104-1/4		13		4	
Half of time spent on both Counts	52		6-1/2		2	
Time spent on atty. fees		51-3/4	2-3/4	2-1/2		
Half of atty. fee time		25-3/4	1-1/4	1-1/4		
Total time for which fee is sought	116-1/4	53-1/4	16-3/4	18-3/4	2	

TIME 5/28/81 TO 8/9/81

112	20	8-3/4	-0-	18-2/3

TIME 8/10/81 TO 11/8/81 [1]

69-1/4	25-3/4	1-1/4		19

RECAP

	Levy	Fox	Morrison	Bratton	Sims	Total
Time on Merits	154-1/4	15-1/2	17-1/2	2	—	189-1/4
Time on Attys. Fees	207	47	11-1/4	—	37-2/3	303

The discussion which immediately follows is related primarily to arguments regarding fees for time spent on the merits, although, as hereinafter noted, some of the considerations, such as adequacy of time records and allocations, would also relate to the records and allocations involving time spent on the fee application through May 27, 1980, and similar time from May 28, 1980, to August 9, 1980.

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[1] This time was expended just prior and subsequent to the evidentiary hearing and is supported only by affidavit attached to plaintiffs' post-trial reply brief. (Doc. No. 173).

A threshold question is first presented. Title I of the LMRDA, 29 U.S.C.A. § 412, under which the instant case arose, makes no specific provision for an award of attorneys' fees. However, in Hall v. Cole, 1970, 412 U.S. 1, the Supreme Court held that a successful plaintiff in a Title I LMRDA suit could recover attorneys' fees where the litigation has conferred "a substantial benefit on members of an ascertainable class, where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." 412 U.S. at 5. IBT, relying on Brennan v. United Steelworkers of America, W.D. Pa. 1981, 501 F. Supp. 912, argues that the burden is upon the plaintiffs to prove entitlement by a preponderance of the evidence in the case, and that a review of the evidence presented in the hearing before the magistrate indicates that they have made virtually no attempt to offer evidence to meet this burden of showing a common benefit for time spent on the *merits*.[2] IBT argues that in addition to plaintiffs' failure to bring forth evidence to satisfy the elements of the common benefit doctrine, the record would permit and support a determination that there was no common benefit. IBT argues that the litigation was essentially private in nature to Mr. Pawlak in that it relieved him from paying an assessment imposed by his local union equal to its costs in defending the unsuccessful suit he filed against it before exhausting his internal union remedies. IBT argues that while the instant litigation also resulted in the invalidation of a portion of Article XIX, § 12(b) of the IBT Constitution, which authorized the assessment imposed upon Pawlak, this relief was incidental to Pawlak's individual relief.

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[2] The requirements under the common benefit doctrine are (1) the benefits may be traced with some accuracy (2) to a class of beneficiaries which is basically identifiable, and (3) there is a reasonable basis for confidence that the costs may be shifted with some precision to those benefiting. Marshall v. United Steelworkers of Amercia, 3 Cir. 1981, —— F.2d —— (December 16, 1981).

IBT argues that Pawlak alone derived a direct benefit from the judgment, and no other injured parties were named in the litigation. IBT argues that "indeed, the provision has rarely been utilized against a union member. Proof of this limited injury was that this suit was not brought as a class action." (Doc. No. 174, pp. 7-12).

Defendants' assertion that this provision has rarely been utilized against a union member does not appear to find support in any evidence placed before the magistrate. In any event, "when a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own rights, the successful litigant dispels the chill cast upon the rights of others." Hall v. Cole, supra, 412 U.S. at 8. It does not appear that the invalidation of the Article of the IBT Constitution in question was "incidental" to Pawlak's individual relief. Without an invalidation of that provision, he would not have been entitled to relief from the fine. Although the discipline of Pawlak was imposed by Local 764, it was done so under a provision which permitted such discipline, and was applicable in every IBT Local. The discipline was approved by IBT's General Executive Board. *Pawlak*, supra, 628 F. 2d at 828. The injunction was directed at the IBT as a whole. As a part of the relief, the court directed that the order invalidating the provision in question be published in a Teamsters publication to do away with the "chilling effect on the exercise of members' rights to file suit." *Pawlak*, supra, 477 F. Supp. at 149. The court of appeals also noted the chilling effect that the invalidated provision would have on union members in the exercise of their statutory right to sue the union. *Pawlak*, supra, 628 F. 2d at 831. These matters are all a part of the court record of which the court can take notice. Indeed, whether the observations of the court be considered as findings of fact or conclusions of law previously made, it would not appear that independent evidence had to be produced by plaintiffs to establish

a common benefit. Marshall v. United Steelworkers of America, 3 Cir. 1981, —— F. 2d—— (December 16, 1981).

IBT cites Brennan v. United Steelworkers of America, supra, for the proposition that success in an action involving election improprieties in two of many districts did not benefit the national union membership as a whole. After the instant action was fully briefed, however, this holding in *Brennan* was reversed. *Marshall*, supra.

IBT next argues that counsel have failed to maintain adequate time records and have failed to make the requisite allocations among claims and parties for time spent on the merits as well as time spent on the fee application. (Doc. No. 174, pp. 17-21). Plaintiffs' counsel has the burden of allocating their requests for fees among the claims and parties. Baughman v. Wilson Freight Forwarding Co., 3 Cir. 1978, 583 F. 2d 1208, 1215; Hughes v. Repko, 3 Cir. 1978, 578 F. 2d 483, 486; Skehan v. Board of Trustees of Bloomsburg State College, M.D. Pa. 1981, 501 F. Supp. 1360, 1384; Barrett v. Kalinowsky, M.D. Pa. 1978, 458 F. Supp. 689-701-2; Brown v. Stackler, 7 Cir. 1980, 612 F. 2d 1057, 1059. It has been held that since the court must make any award of fees based on the market value of the legal services rendered, it must be provided with documentation demanded in the marketplace, that is, by clients from law firms. Jordan v. United States Dept. of Justice, D. D.C. 1981, 89 F.R.D. 537.

In accordance with the above principles, on October 24, 1978, the day after this action was filed, the court entered Practice Order #2, which provided under ¶ 9 thereof that any application for counsel fees shall be based upon time records concurrently kept and shall set forth in detail by schedule or otherwise the date each service was rendered, service rendered on each date, the name of the lawyer who rendered the service on each date, the amount of time spent on each date, the lawyer's normal hourly

billing rate, and such other matters as may be of value to the court in fixing the fee. It was further provided that any application for reimbursement for expenses shall be based upon records concurrently kept, and shall set forth in detail by schedule or otherwise the date each expense was incurred, the item or service for which the expense was incurred, who furnished the item or service, the date of payment of the expense if not paid when incurred, and such other matters as may be of value to the court in determining whether the expenses were reasonable and necessary. Finally, it was provided that at any hearing on fees and expenses, time records and vouchers for expenses shall be produced. (Doc. No. 4).[3]

Plaintiffs' counsel has not kept time records in accordance with the principles set forth in the above cases and the court's practice order, and have otherwise failed to sustain their burden to show what counsel fees may be appropriately awarded against IBT on Count I.

As noted above, the complaint in this case involved Count I relating to the fine, and Count II which as hereinafter discussed related to matters concerning the mailing of by-laws data by Local 764. IBT was not involved in Count II and IBT states (Doc. No. 174, p. 14), and plaintiffs' counsel does not appear to deny, that it was *not until* the eve of the August 11, 1981, hearing before the magistrate that plaintiffs' counsel conceded in a stipulation that the Public Citizen Litigation Group does not seek an award of attorneys' fees against IBT on Count II of the Pawlak complaint. (Doc. No. 181, Stip. ¶ 1). Thus, it would be necessary for plaintiffs' counsel to

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[3] When the assignment to handle the fee application was first received by the magistrate, the magistrate did not then have the entire file in this case, and thus the magistrate issued a similar practice order on May 13, 1981. Although defendants refer to the magistrate's practice order (Doc. No. 174, p. 15), the court had long before notified the plaintiffs what was expected of them in terms of record keeping. (Doc. No. 4).

establish through proper records the time that was expended to establish IBT's liability, particularly when one remembers that there were *three* other defendants in this case, Local 764, the Joint Counsel, and Greenawalt, all of whom were involved in Count I. Not only do the records submitted in this case fail to permit a determination as to efforts expended, or necessity therefor, in relation to Count I as against each of the defendants, but also these records would indicate that it is just as likely as not that some time expended on Count II is being charged to IBT on Count I.

As IBT argues, the time and expense records maintained by plaintiffs' counsel, then offered as evidence to the court, in most cases fail to include any details concerning the specific nature of the legal services provided. Mr. Levy, whose time represents by far the most time spent on this case by the various lawyers of Public Citizen Litigation Group, was "recorded" on Mr. Levy's desk calendar. In most cases, the entries were very general in nature and did not distinguish between Counts I and II, did not distinguish between defendants, and in fact did not describe, except in a most general way, the nature of the legal service rendered. For example, entries on Levy's calendar on January 9, 1979, showed 2 hours spent on "Resp. to Mot. to Dismiss" and one-half hour spent on "Ac, Work Prod." Entries on January 10 indicated "talk w/Gary Witlen re discov. 11:30-12," and "1-4 Mot. to Dism." (Doc. No. 182, Exh. P1, 8/11/81). In the *later* summarization of these hours in a schedule for purposes of the fee application in this case (Doc. No. 182, Exh. P4, 8/11/81), the summary in some cases took on a somewhat different form than the notation on the calendar. For example, the January 9 notation, "Ac, Word Prod. 9:30-10," became "research on work product, attorney-client." Thus, in a summary prepared for the fee application, and *not* from the "time record," we are told for the first time that this was research, as distin-

guished from perhaps drafting documents, conferring, and the like. In any case, this and most other entries on the *calendar* suffer from the same defects in that the calendar pads do not disclose what precise service was rendered in connection with the motion to dismiss, that is, research, drafting documents, conferring, and the like. Further, none of the calendar entries appear to distinguish between Counts I and II. (Doc. No. 182, Exh. P1).

As a result, in preparing the summary, it was necessary for Mr. Levy to go back over the several years of entries on the calendars to attempt to identify whether an entry or entries on any given date were related to Count I or II, or as he terms it, to both Counts. In making this allocation on the *summary*, Mr. Levy testified that any entry he recognized as relating to Count I, he labeled "fine," and an entry relating to Count II he labeled "by-laws mailing." He further testified that "the time I *couldn't tell* or I knew that the time was devoted to both Counts of the complaint, and those I have marked ½." (Doc. No. 177, Trial Tr., p. 84). Significantly, this "½" time that he could not always determine what it related to amounts to almost half of Mr. Levy's time expended prior to January 1, 1980.

Even when making this so-called allocation, he stated that in describing the services in the *summary*, "I may in some cases have gone to the file to figure out what a particular thing meant." He added, "I believe my recollection is that I took all of the information from the calendar," although he added that since the first three pages of the summary were made up "some time ago," his recollection was not clear as to exactly how he did it. (Doc. No. 177, Trial Tr., pp. 86-87). As a result, the IBT is charged for some time spent on issues related to Local 764 and Greenawalt and is allocated one-half rather than one-fourth of the time spent on Count I matters even though there were four defendants under Count I.

As defendants point out, even if counsel had divided the hours and expenses by the proper number of parties, such an allocation proportionate to the correct number of parties has been rejected in this circuit as a method of allocation. Baughman v. Wilson Freight Forwarding Co., supra.

Many examples of this misallocation can be given where plaintiffs' counsel attempt to bill the International Union for time spent dealing with counsel for Local 764. For example, an entry of January 30, 1979, on the calendar indicates "11:40-12:09 Weinstock discussion," and in the summary, Exhibit P4 (Doc. No. 182), this is indicated as "confer with Weinstock." Mr. Weinstock is counsel for Local 764 against whom fees are being sought in connection with Count II, and not Count I. Yet, on the summary, one-half of that discussion is charged to IBT in connection with Count I. Other such illustrations are the entries of February 12, 15, 22, 1979; March 14, 1979; April 25, 1979; May 8, 1979; and June 12, 15, 19, 20, 1979. (Doc. No. 182, Exh. P4). Further, as noted above, plaintiffs' counsel had failed to apportion any of the time spent on Count I among the four parties to that Count. (See Doc. No. 182, Exh. P4, Levy time—Sept. 7, 16, 18, 21, 22, 25, 26, 29, 1978; October 10, 12, 1978; November 18, 22, 1978; January 2, 4, 5, 6, 8, 9, 10, 30, 1979; February 7, 12, 15, 21, 22, 26, 28, 1979; March 14, 15, 16, 1979; April 5, 6, 12, 23, 25, 26, 1979; May 7, 8, 9, 1979; June 1, 2, 3, 12, 13, 15, 18, 19, 20, 21, 22, 1979; Doc. No. 182, Exh. P15, Levy time—June 16, 18, 23, 24, 25, 1981; July 15, 20, 1981).

Plaintiffs' trial Exhibit P8 (Doc. No. 182), a summary of Litigation Costs, reflects similar "allocations," which were done after the fact on a haphazard basis. For example, with respect to xeroxing costs, Levy stated that he looked at the pleadings that had been filed on a given date, would decide if it was addressed to Counts I or II

or both, and decide how to allocate the charge. Where he did not have a voucher, he would count the pages of a pleading to determine how many pages must have been reproduced for filing and service, and allocate as above. (Doc. No. 177, Trial Tr., pp. 91-94).

There are other examples where plaintiffs' counsel seeks to charge IBT for time spent dealing with other parties. For example, they charge the IBT for one-half of the time spent in "discovery to G and Local," apparently referring to Greenawalt and Local 764. (Doc. No. 182, Exh. P4—February 26, 1979). In numerous other entries on the summary, IBT is being charged for one-half of the time spent for legal services relating to "discovery" in general. (Doc. No. 182, Exh. P4—Nov. 18, 22, 24, 25, 1978; February 28, 1979; April 5, 6, 12, 23, 25, 26, 1979; May 7, 8, 9, 20, 1979). IBT is also being charged one-half of the time spent on the general description of "Mot. to Dismiss" which did not involve the International Union. (Doc. No. 182, Exh. P4—Jan. 2, 4, 6, 8, 9, 10, 1979). The recording of Fox's time on a calendar (Doc. No. 182, Exh. P2) and its summarization and allocation (Doc. No. 182, Exh. P4) is just as imprecise as the recording and allocation of Levy's time. Fox was the only other attorney who spent time of any significance on the merits. The same can be said of Morrison who was the only other lawyer to spend time on the merits. (Doc. No. 182, Exh. P3 as summarized on Exh. P4).

In addition, the amount of hours worked by an attorney should not be taken at face value; rather, the district court should consider only those hours worked by an attorney which were reasonably supportive of the claim, and in addition whether it was reasonably necessary for the attorney to spend the number of hours to perform those services. Barrett v. Kalinowsky, supra. Not only do the above described records fail to permit a determination as to the precise nature of the legal serv-

ices and the amount allocable to IBT under Count I, but also these records and the other evidence offered do not permit a determination as to the necessity to perform certain work and whether the work was reasonably supportive of the claim.

Levy's testimony at the trial shed no more light on these matters. Sims, who conducted the direct examination, indicated that he wanted to ask Levy a "few questions" going to the reasonableness of the time spent, but cautioned Levy that he did not want to spend "too much time on this," and that Levy did not have to go into "tremendous detail" about every aspect of "a long case which has been certainly complex." (Doc. No. 177, Trial Tr., p. 106). Little testimony was adduced and what was adduced was general. For example, when asked to state in a "general way" the scope of discovery that was conducted, Levy replied, "We served some interrogatories. We accepted [conducted?] depositions." (Id. at p. 107). At that point, IBT counsel indicated that if a chronology was being elicited, it had been stipulated to, and Sims replied that he agreed except for a "few gaps." (Id. at pp. 107-108). The stipulated chronology, however, does not provide information from which it could be determined if all efforts undertaken were reasonably necessary. (See Doc. No. 181, Stip. ¶¶ 91-122).

Further, many of the records submitted are not "concurrent" as required by the court's practice order entered early in this case, but are based upon reconstruction. The time claimed for Morrison through May 27, 1981, long after the merits had been determined, is admittedly based on a reconstructed (non-contemporaneous) record. (Doc. No. 182, Exhs. P21 and J-2; Morrison Dep. 81-84; Doc. No. 182, Exhs. P18 and J-1; Levy Dep. 121-126; Doc. No. 181, Stip. ¶ 89; Doc. No. 177, Trial Tr. at pp. 90, 102, 180-181). The time spent on this case by Bratton, the Public Citizen Litigation Group's *local* counsel, was said to be 4 hours, half of which is allocated to IBT

on Count I, but even then it is admitted that the basis for Bratton's award of attorney's fees is not contemporary time records, but rather estimates reconstructed from *Levy's* records and both attorneys' recollections. (Doc. No. 181, Stip. ¶ 89). Further, Levy has admitted that "we don't have a regular procedure" for keeping time records (Doc. No. 182, Exh. P18 and J-1, Levy Dep. at 117), and both Fox and Levy do not keep daily report sheets; instead, notations are made on the desk calendar, but only in cases where attorneys' fees are going to be sought. (Doc. No. 182, Exhs. P18 and J-1, Levy Dep. at 117-118 and Exh. 7 thereto; Doc. No. 181, Stip. ¶ 58; Doc No. 177, Trial Tr., 87, 89). Levy admitted that even these entries on his calendar were made at either the end of the time segment or the end of the day, or sometimes a day or two later. (Doc. No. 177, Trial Tr. 81). Similarly, Fox makes the notations either on the day the time was actually spent "or within the next day or two" (Doc. No. 181, Stip. ¶¶ 58-59), and has occasionally made errors by jotting down his notations on the wrong page of his calendar. (Doc. No. 181, Stip. ¶ 60).

Further, plaintiffs' counsel have exercised what they term "billing judgment" *before* actually recording the time spent on a particular activity. (Doc. No. 181, Stip. ¶ 61; Doc. No. 182, Exhs. P18 and J-1, Levy Dep. at 116). It would seem that their records should reflect all time spent and how much was deducted for "exercising billing judgment." Further, Levy has stated that he sometimes forgot to record the time that he had spent (for which no fees are being sought) (Doc. No. 182, Exhs. P18 and J-1, Levy Dep. at 117; Doc. No. 177; Trial Tr. 81) which would point to a further unreliability of the records in this case.

Finally, even the summaries of time submitted to the court are inadequate. Although the summaries show the time spent in chronological order, and allocations to Count I, the summaries do not recap the time in terms

of time spent on pleadings, motions, conferences, and the like. Perhaps counsel feels that the court should laboriously pour over the records in an attempt to extract this information, but that is counsel's responsibility.

Plaintiffs' counsel's reply to these matters, all raised in defendants' brief (Doc. No. 174), is rather anemic. They indicate that although plaintiffs have agreed that through August 9, 1981, 17½ hours of Alan Morrison's 27½ hours and all of Bruce Bratton's 2 hours are based upon reconstruction, the IBT claims that Levy's time was also based upon reconstruction. Plaintiffs argue that to accomplish this, IBT takes out of context Levy's statement at his deposition that there is no regular procedure for billing clients, thereby suggesting that he said he had no regular procedure for keeping time records. They argue to the contrary that Levy testified that the regular procedure for keeping time records was to make notations in his daily calendar. (Doc. No. 173, p. 4). The magistrate does not believe that the IBT takes Levy's testimony out of context. He testified that because they do not bill clients, the Public Citizen Litigation Group does not have a "regular procedure for putting out, you know, somebody else after they get something from me, cutting it up and sending it out to various people." Rather, Levy testified that in a fee generating case, such as the instant case, he made notations on calendars. (Doc. No. 182, Exhs. P18 and J-1, Levy Dep. pp. 117-118). There was no indication that there is a regularly established procedure for all members of the Public Citizen Litigation Group to follow in fee generating cases. Thus, the calendar procedure that was followed by Levy and Fox, and the reconstruction method followed by Morrison, would certainly not be considered a "regular" procedure.

Plaintiffs also reply that the IBT claims that the transcript shows that Mr. Levy's testimony at trial was that he had to refer to his files to reconstruct his time record, but that actually the cited testimony was that in com-

piling schedules for the court's use from the calendar notations, Levy sometimes referred to the files in order to more fully explain notations on the calendar pads. (Doc. No. 173, p. 4). However, Mr. Levy's testimony did indicate an element of reconstruction. As discussed above, it is true that Levy testified that he recorded his time on his desk calendar pad, but he also testified that he did this sometimes at the completion of the matter on which he was working, sometimes at the end of the day, and sometimes a day or two later. Moreover, although hours may have been recorded on the calendar pad, when Levy attempted to prepare the summary referred to, the notations concerning those hours were not sufficient to indicate what the hours were for and, therefore he testified that in some cases he may have had to go to the file "to figure out what a particular thing meant." Although the calendar information was then summarized, the summarization would appear to be also a reconstruction of the basic calendar record which should have contained that information in the first place, but did not.

With respect to the matter of allocation, plaintiffs argue that the IBT complains that it is asked to pay for plaintiffs' counsel's time spent dealing with counsel for Local 764. They argue, however, that these discussions "often concern matters directly relevant to plaintiffs' case against the IBT, such as efforts to settle the case or to obtain information relevant to IBT's liability." (Doc. No. 173, p. 5). Through the use of the word, "often," they seem to admit that in some cases this would not be so, but in any event, these are merely assertions made in a brief with no evidence pointed to back up the statements. That information certainly does not appear from the time records. Plaintiffs further argue that IBT objects to allocation of a portion of time spent on discovery with the other parties, but that this discovery, however, "was concerned with such matters as the IBT's venue defense, the fact that Pawlak's fine was imposed because of the mandate of the IBT, and the existence of the chilling

effect which justified the notice to all members of the court's decision." (Doc. No. 173, p. 6). However, once again, the time records for work on any given day do not reflect this.

On the basis of these inadequate records and allocations for time spent and costs incurred on the merits, the magistrate believes there should be no award of fees or costs. As stated by the court in Brown v. Stackler, supra, 612 F. 2d at 1059, denial of fees is an appropriate means to encourage counsel to maintain adequate records, and submit reasonable, carefully calculated and conscientiously measured claims when seeking counsel fees.

Although the magistrate believes that the above would preclude an award of fees in this case, certain other matters will be discussed in the event that it is found that the magistrate is in error in that regard. IBT argues that even if the records of the Public Citizen Litigation Group permitted a determination as to what time was properly chargeable to IBT on Count I, any such award should not be based on "market value" or prevailing rates, but should be based upon the cost to Public Citizen, Inc., in litigating this case, represented by the salaries converted into hourly rates actually paid to counsel by the Public Citizen Litigation Group, and (presumably) an allocable share of overhead. In that connection, the two counsel most active in the trial of the merits, Levy and Fox, are paid $17,000 and $22,500 per year, respectively, by Public Citizens Litigation Group which, based on the normal work year of 2080 hours, would result in hourly rates of about $8.00 and $11.00, respectively. (Doc. No. 181, Stip. ¶¶ 15, 49). As hereinafter discussed, the rates being sought for these individuals is much higher. Defendant advances three theories in support of this contention.

IBT argues first that the rationale for a fee recovery under Hall v. Cole, supra, is that beneficiaries (rank and file) of the plaintiffs' litigation should be made to con-

tribute to the cost of the suit, and that clearly "the common benefit" rationale for fee recovery is to compensate or reimburse the plaintiffs for litigation costs. It argues that here plaintiffs had no such costs as they were represented on a *pro bono* basis by the salaried attorneys of Public Citizen Litigation Group. IBT argues that it does not suggest that counsel are not entitled to a fee award merely because the attorneys are salaried, but rather such an award should be keyed to the attorneys' salaries and not to prevailing market rates. It argues that while no monetary benefit was created in this case, the award rationale in both "common fund" and "common benefit" cases is identical. IBT argues that a fee entitlement against the Union depends on the court's finding that a substantial benefit was conferred upon its members, and since the Union is comprised of its members whose dues money constitutes its treasury, any fees paid to counsel will essentially come out of a "common fund." IBT argues, therefore, that fees based on the salaries paid are a proper, fair and adequate award, in that the theory underlying awards in cases such as this is not intended to benefit attorneys or subsidize public interest organizations; rather, its purpose is to prevent unjust enrichment by members of a union at the expense of an individual member by spreading the litigation costs among them. IBT then goes on to attempt to distinguish civil rights or civil liberties cases which have held that public interest organizations with salaried attorneys should be awarded fees at market rates and not according to salary where such awards are necessary to encourage vindication of broad civil rights or liberties. (Doc. No. 174, pp. 21-22; Doc. No. 179, pp. 9-14).

IBT has cited no authority directly on point to support its argument. On the other hand, in Rodriguez v. Taylor, 3 Cir. 1977, 569 F. 2d 1231, and Miller v. Apartments & Homes of N.J., Inc., 3 Cir. 1981, 646 F. 2d 101, 113, the court held that attorneys' fees based on the fair market value of services provided may, in a proper case, be

awarded even when the litigant has been represented by a non-profit legal services organization that provided its services free of charge, noting, however, that since the object of the fee awards is not to provide a windfall to individual plaintiffs, the fee awards must accrue to counsel. See also Cunningham v. Federal Bureau of Investigation, 3 Cir. 1981, —— F. 2d —— (November 24, 1981), slip Opinion, n. 1 and n. 2, at pp. 6-7. Although it is recognized that the above cases arose under the Civil Rights Act or Freedom of Information Act, in Hall v. Cole, supra, 412 U.S. 1, the language in which IBT heavily relies in advancing its argument, the fee established by the lower courts was based on a reasonable hourly rate, 376 F. Supp. 460, 461, despite the fact that the services were provided "largely on a *pro bono publico* basis," and with counsel and his client bearing the costs. 462 F. 2d 777, 780-781.

Further, although IBT argues that since the instant matter did not involve the vindication of broad civil rights or liberties (Doc. No. 179, p. 13), the rights vindicated were at least as broad as exists in many civil rights cases, that is, the removal of a provision which was found to have a chilling effect upon the rights of rank and file Teamsters to seek access to the courts.

IBT further argues that the award should be limited to costs because the ultimate recipient of any fee award in this case would be Public Citizen, Inc., which, except for its litigating arm, Public Citizen Litigation Group, is a lay organization engaged in a wide variety of lay projects, including Congress Watch, Tax Reform Research Group, Critical Mass Energy Project, and others. (See Doc. No. 181, Stip. ¶ 126). In that connection, IBT points out that plaintiffs will not receive any portion of an award and will not be liable for any fees or expenses in the event the application is denied; that all of the attorneys in this fee application except local counsel, Bratton, are salaried employees of Public Citizen, Inc.; that if an

award is made, none of the employees will receive any portion of the award; and that Public Citizen Litigation Group does not have a separate legal identity apart from Public Citizen, Inc., and does not have a separate bank account for the receipt of fee awards. IBT argues that their position that any fee award be limited to actual costs in litigating this case derives from the ethical principles embodied in the ABA Code of Professional Responsibility that attorneys may not split fees with laymen or enable them to engage in the unauthorized practice of the law. IBT argues, therefore, that since all fees recovered would belong to Public Citizen, Inc., an above cost award would permit the employing lay organization to capitalize upon the attorneys' services, reap a profit therefrom, and put the moneys it thus made to any use it chooses. IBT relies on National Treasury Employees Union v. United States Dept. of the Treasury, D.C. Cir. 1981, 656 F. 2d 848. (Doc. No. 174, pp. 22-27).

If, as IBT contends, any fee award at market value would go into the general treasury of Public Citizen, Inc., for use in supporting any activities, legal or lay, then the IBT's position is supported by *National Treasury Employees Union*, supra. However, although there is evidence that prior to July 29, 1981, attorney's fees earned by the Public Citizen Litigation Group were to be given to Public Citizen, Inc., apparently for general purposes (Doc. No. 182, Exh. P18 - J-1, p. 82; Exh. P21 - J-2, p. 66), by letter dated July 29, 1981, Sidney Wolfe, the President of Public Citizen, Inc., informed Alan B. Morrison, Director of Public Citizen Litigation Group, that as a result of the decision in *National Treasury Employees Union*, supra, a policy was being instituted that all attorneys' fees received by the Litigation Group would be used solely to support the litigation activities carried on by that office and that in the unlikely event that the amount of fees received in a particular year exceeds the total expenses of the Litigation Group for that year, the excess funds would be held for use in support of litiga-

tion to be conducted in future years. (Doc. No. 182, Exh. P5; Exh. P21 - J-2, Morrison Dep. 67-68; Exh. P18 - J-2, Levy Dep. 147). In *National Employees Treasury Union*, supra, the court recognized that in awarding full fee allowances to public interest law firms, the important consideration was that the fees were plowed back into the litigative programs that made their recovery possible in the first place. The court went on to note that full fee allowances may withstand criticism when the moneys are directed into a fund for maintenance of a legal services program, a matter which the court was not then deciding.

IBT argues, however (Doc. No. 174, pp. 27-28), that the evidence shows that the Public Citizen Litigation Group did not in the past, *and does not currently*, have a separate account for receipt of attorneys' fees (Doc. No. 181, Stip. 135), and that as of the date of Morrison's deposition on August 7, 1981, there was no action to comply with the so-called policy change of July 29, 1981. (Doc. No. 182, Exh. P21 - J-2, Morrison Dep. at 68). However, it does not appear that action would have to be taken to comply with the policy if no fees have yet been received on which the policy would operate. Thus, it does not appear for this reason that the attorneys' fees in this case should necessarily be limited to costs.

IBT argues, however, that the activities of the Public Citizen Litigation Group attorneys reflect a clear involvement in the lay or political activities of Private Citizen, Inc., including public speaking, publishing, advisement coordination of "rump" groups, organization activities, editors, and writers for newsletters, and the like, and that these activities were so intertwined with the litigation activities in this case that fees should be limited to costs. IBT relies on Brennan v. Steelworkers, supra, in which a fee award to a staff attorney for the Association for Human Democracy was denied because her work in the election of officers of the union "was predominantly

non-legal and political in nature." (Doc. No. 174, pp. 28-34). This part of the *Brennan* decision was not reversed. Marshall v. Steelworkers of America, 3 Cir. 1981, —— F. 2d —— (December 16, 1981). However, despite the meager time records submitted to this court, an overall review of the record would not suggest that the work of plaintiffs' counsel in this case—motion practice, briefing, discovery, argument, trial, appeal, and the like—was anything other than legal in nature. The main problem, as previously noted, is that the time records do not indicate whether the work or the time expended was reasonably necessary, or whether all or part of this time should be allocated to IBT.[4]

In any event, even if IBT's argument were correct that the award should be limited to costs, that is, the (computed) hourly rates actually paid to Public Citizen Litigation Group employees times the number of hours, plus perhaps an allocable share of overhead, there is little evidence in this record to indicate what those costs should be. Although in the stipulation of facts the court is told of the annual amount of the salary of Mr. Levy and Mr. Fox (Doc. No. 181, Stip. ¶¶ 15 & 49), there is no evidence of what other counsel are paid, and in any event plaintiffs' counsel have not approached this case from the standpoint of seeking an award of costs. Plaintiffs have

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[4] In IBT's post-trial brief, it argued that, in effect, Public Citizen Litigation Group, gladly undertook this litigation at no cost to the plaintiffs as one part of an organizational program of a national basis of challenging Teamsters Union operations, efforts to which had been largely unsuccessful in the past, so as to, in effect, teach the large Teamsters Union a lesson when dealing with the "underdog" rank and file. Thus, IBT argues that this case can be viewed as a "cause celebre" which would prevent an award of any fees other than costs. In this argument, IBT relied largely on Anderson v. Morris, D. Md. 1980, 500 F. Supp. 1095. (Doc. No. 174, pp. 34-40). However, as plaintiffs pointed out in their post-trial brief (Doc. No. 171, att.), the *Anderson* case was reversed to the extent that its holding was predicated on that theory, and in its reply brief, IBT does not again raise this point. (Doc. No. 175).

apparently presented no evidence, in the alternative, as to costs because they feel that they are entitld to a market value award, and thus, if costs were the criteria, there would be no basis on which such an award could be made even if a number of hours properly expended and allocable had been identified.

In any event, it would appear that if counsel were entitled to an award of fees for the work performed on the merits, the "market value" or customary hourly rate of compensation in this and similar type cases should be considered. The starting point in any fee case is first to ascertain the nature and extent of the services supplied by the attorney, and next determine the customary hourly rate of compensation. The court should then multiply the number of hours reasonably expended by the customary hourly rate to determine an initial amount for the fee award which is to be then adjusted upward or downward based on other factors. As previously discussed, not only have the plaintiffs failed to present satisfactory evidence showing the nature and extent of hours reasonably expended which should be allocable to IBT on Count I, but also, as hereinafter discussed, the evidence in this case falls far short of providing the court with information from which the customary hourly rate could reasonably be arrived at.

The four Washington based attorneys in this case, Levy, Fox, Morrison, and Sims, seek compensation at hourly rates as follows: Levy, pre-January 1, 1980, $65; Levy post-January 1, 1980, $75; Fox, $90; Morrison, $90; and Sims, $80. In addition, $50 per hour is sought for the services of Bratton who was local counsel and whose participation in this case was negligible. Plaintiffs' counsel contend that they should be compensated hourly rates prevailing in the Washington, D.C., area for law firms performing the type of services that were provided in this case. (Doc. No. 182, Exh. P18 - J-1, Levy Dep., p. 98). In their post-trial brief, counsel argued that this

would be particularly appropriate in a case such as this in which plaintiffs could not find local counsel who were willing and able to carry out a substantial part of the burden in this case. (Doc. No. 171, p. 20). This assertion is not supported by Mr. Levy's testimony at the trial (Doc. No. 177, Trial Tr., p. 107), or by his own time records which reflect "¾ hour" "seeking local counsel." (Doc. No. 182, Exh. P4).

In any case, the primary expenditure of time on the *merits* of this case was by Mr. Levy with some time expended by Morrison and Fox in supervisory or advisory capacities. (Levy Dep. at 36, 45-46). Mr. Levy could not testify from his *personal experience* with regard to what he may have charged in other cases because Mr. Levy, and for that matter Mr. Fox, have never secured an award of attorneys' fees. (Doc. No. 181, Stip. 71). The testimony be offered was not only hearsay, but vague. The hourly rates to which Mr. Levy feels he is entitled were established by him based upon his personal assessment of the range of hourly rates charged by about 10 Washington, D.C., law firms for federal litigation, which rates are higher than those requested in this case. He arrived at this assessment only by informal discussions with personal friends at law firms and then incorporated the assessment into his affidavit accompanying the application for attorneys' fees in this case. (Doc. No. 182, Exh. P18, J-2, Levy Dep. 112, 113, 95-106). At his deposition, Mr. Levy did not provide any documentation, and refused to disclose the names of the individuals or firms that provided this information which he included in his affidavit on the basis that the information was given to him in confidence. (Doc. No. 182, Exh. P18, J-2, Levy Dep. 95-106). He did not provide this information at the trial. Mr. Sims who represented Mr. Levy at the deposition further stated at the deposition that the information regarding Mr. Levy's assessment was privileged as a "trade secret." (Doc. No. 182, Exh. P18, J-2, Levy Dep. at 98). It is difficult, however, to see how any such in-

formation could be considered a trade secret, particularly when it seems that it would be included in any bills sent by the law firms to their clients which, in turn, would be handled by office personnel and others for payment. Under such circumstances, the secret would not be very well kept.

It may be that IBT's counsel would have compelled the disclosure of the source of this information through a motion filed with the court. However, the burden is on the plaintiffs in this case to establish their entitlement, and having asked for, and having been refused, that information, it was not up to IBT's counsel to move for a disclosure and possible verification of this vague information.

Further, the firms involved were "large law firms" by Washington standards and represented management, not unions (Doc. No. 182, Exh. P18, J-2, Levy Dep. 221, 222), even though it was conceded that firms that represent management have higher rates than those that represent labor. (Doc. No. 182, Exh. P21, J-2, Morrison Dep. at 119; Doc. No. 181, Stip. 79). With one exception, Levy made no effort to inquire of the firms that represent members who sue their unions, although Levy testified that he did not do so because normally rank and file workers cannot afford to pay much in the way of attorneys' fees. He stated, however, that he did make one inquiry of a person who worked in a private firm representing rank and file workers, but that person "didn't know his rate." (Doc. No. 182, Exh. P18, J-2, pp. 226-228).

Morrison's testimony on rates was similar to Levy's and did not indicate information gained from either experience or from what one might consider anything approaching an acceptable sampling technique. Morrison admitted that he did not conduct a survey (Doc. No. 182, Exh. P21, J-2, Morrison Dep. at 118), and he is not fa-

miliar with the rates for union firms, (Id. 118-119). Morrison testified that his familiarity with fees "is based upon the fact that I have a large number of friends who are lawyers in law firms and I talked, from time to time, with them about fee levels in general and what people approximately my time out of law school are earning," although he also indicated that some of his familiarity was based upon "reading cases on attorneys' fees in the District of Columbia." (Id. 108-109). Based on this information, he testified as to what he felt that law firms would bill for the lawyers involved in this case: Morrison $125 per hour; Fox $90-$95; Sims $80-$85; Levy $70-$85. (Id 108-113).

At the hearing before this court, Sims, who did not work on the merits but who worked exclusively on the *fee application*, testified with respect to matters in an attempt to justify the hourly rate requested for him. Although the reporting firm was unable to transcribe the tape on which Mr. Sims' testimony was recorded,[5] Sims testified that he was basing his request for an hourly rate of $80 per hour on informal contacts with friends regarding what would be reasonable for attorneys of his experience, and the like. However, he indicated more specifically that his testimony was based on a phone call to a former law school classmate who was general counsel for the Washington Post and who at times was required to engage outside counsel on labor matters. Sims testified that after telling his classmate something about the case, he was advised by this classmate that the going rate for associates of 3 or 4 years experience was $75 to $80 per hour.

Aside from the testimony of counsel in this case, which was based upon extremely random inquires, plaintiffs of-

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[5] The magistrate has since discovered that this testimony could be transcribed on his courtroom equipment, and it has been inserted at the end of the trial transcript with copies to counsel.

fered an affidavit of James R. Klimaski, who was co-counsel with Levy in Lamb v. Miller, a case apparently involving a union member against his employer before the Labor Board. That case was still pending at the time of the hearing in this case. The affidavit of Mr. Klimaski indicated only that he is a *partner* in the firm and that his normal billing rate as at the date of the affidavit, April 1, 1981, was $75 an hour. (Doc. No. 182, Exh. P9). The affidavit did not specify whether this rate applied to only labor cases or any and all type cases undertaken by Mr. Klimaski. In any event, while that may have been Klimaski's billing rate as of April 1, 1981, in Lamb v. Miller, Klimaski charged only $50 an hour, although Levy indicated that that may have been a discount rate, and that in any event, Mr. Klimaski's billing rate was $60 an hour and has since gone to $75 an hour. Moreover, the rate of $50 an hour charged in 1979 was during the same time frame as the work on the merits in the instant case. (Doc. No. 177, Trial Tr. 65-72). Finally, although Klimaski's rate may now be $75 per hour, as noted above, he is a partner and this rate is lower than that being sought for Morrison, Fox and Sims, and equals that being sought for Levy, even though Levy testified that if he were in a law firm, he and Sims would be considered "senior associates." (Doc. No. 182, Exh. P18, J-2, Levy Dep., p. 95).

Further, although Mr. Levy and Mr. Fox have never before received a fee award, they have *applied* for (but have not received) a fee award in Brink v. DaLesio. In that case, Levy requested $60 and Fox $80, and for that matter, Morrison requested $80. In addition, in a Rule 37 motion in that case, Levy requested $45 and Fox $75. (Doc. No. 182, Exh. P18, J-2, Levy Dep. p. 63 and Exh. 21 thereto; p. 64 and Exh. 16 thereto). All of these rates are lower or substantially lower than the rates requested in this case, even though that case began in 1977, and the time period covered by motions was 1978 and 1979,

roughly the same time period as in the instant case. (Doc. No. 182, Exh. P18, J-2, Levy Dep. 62-65).

About the firmest evidence regarding prevailing rates regarding union matters is that to which the parties have agreed with respect to what IBT pays for private counsel. The majority of the attorneys representing IBT throughout the United States and Canada are paid at the rate of $50 per hour. The lone exception is the law firm of Dickstein, Shapiro, and Morin (DSM), a 67 lawyer law firm (28 partners, 39 associates), with offices in Washington, D.C., and New York City, which was *not* counsel in this case. IBT pays DSM $90 per hour for partners' time and $75 per hour for associates' time. However, *before* January 1980, the IBT paid $75 per hour for the time of all attorneys, whether partners or associates, and these rates do not vary according to the subject matter of the legal services DSM provides. (Doc. No. 188, ¶¶ 72-75).

As hereinafter discussed, if the magistrate were to opt for any rate from the evidence in this case, it would be a $50 per hour rate for Levy and Sims and a $75 per hour rate for Fox and Morrison.

Plaintiffs' counsel not only seek an award of fees, but feel that they are entitled to a multiplier of 1.5. On the contrary, the magistrate believes that if any fees are awarded, they should be reduced by at least 25% due to the inadequacy of the records and other evidence showing time properly spent and allocable to IBT on Count I. Skehan v. Board of Trustees of Bloomsburg College, M.D. Pa. 1981, 501 F. Supp. 1360, 1382. Further, other matters do not justify an increase, much less an award, at the rates above found applicable.

The issue raised in Count I appeared to involve only a question of statutory construction which was resolved on summary judgment based upon a stipulated record. The primary question raised was not complex, that is, whether

a particular provision of the IBT constitution was invalid in that it restricted the right of a union member to sue his union in the manner that is inconsistent with the Landrum-Griffin Act, and thus would chill union members in the exercise of their statutory right to sue the union. Further, it does not appear that a high degree of skill would be required to properly perform the legal services rendered.

Nor does it appear that the attorneys' involvement in this case cost them in terms of lost opportunity. The case was undertaken voluntarily without regard to whether or not attorneys' fees would be awardable (Doc. No. 181, Stip. 139, 70; Doc. No. 182, Exh. P18, J-2, Levy Dep. 159), and the Public Citizen Litigation Group did not refuse any cases as a result of being preoccupied with the Pawlak case. (Doc. No. 181, Stip. 138; Doc. No. 182, P18, J-2, Levy Dep. 157). Moreover, it does not appear that any time limitations were imposed by the plaintiffs upon their counsel, nor does it appear that any other circumstances in this case would indicate that counsel had to work at unusual speed. The amount controversy was not great, and although the results obtained redounded to the benefit of plaintiffs and in the future could have an impact on a decision by a rank and file member as to whether to sue their union, there is no indication as to how many rank and file members in the past may have been dissuaded from using the IBT by reason of the provision of the IBT constitution litigated in this action.

Nor would the background and experience of counsel indicate that the efforts brought to bear in this action required skills comparable to experienced labor counsel, and should be compensated accordingly.

Levy, the principal counsel in this case, has been admitted to the Bar less than 4½ years (Doc. No. 181, Stip. ¶ 7), although he served as a law clerk to a federal circuit judge, Judge McCree, and later accompanied him to Washington as a special assistant when Judge McCree

was appointed as Solicitor General. Levy served in that capacity only for a short time before joining the Public Citizen Litigation Group. (Doc. No. 181, Stip. ¶¶ 6, 12). Although he testified that he specializes in certain areas of labor law, such as the "union democracy" case presently before the court, he has never worked for a labor union, the NLRB, or the U.S. Department of Labor (Id. ¶ 6), and has never represented a union entity except in one case where he represented an International Brotherhood of Electrical Workers local union as an intervenor. (Doc. No. 182, Exh. P18, J-2, Levy Dep. at 70-71). He did not concentrate on labor law in law school, and has not done any graduate work in labor law. (Id. at 84). Both Morrison and Fox serve in "supervisory/advisory capacities" to guide his work (Id. at 36, 45-46; Doc. No. 177, Trial Tr. at 187), and his work is reviewed "as a regular matter." (Doc. No. 177, Trial Tr. at 43, 48-49, 187). Levy testified that the only full-fledged evidentiary hearing in which he participated was the 3 week trial in Brink v. DaLesio, and his co-counsel in that case was Fox, his supervisor. Although Levy testified that he was lead counsel in a number of cases, many of those cases, as in the instant case, were disposed of on pre-trial motions. (Doc. No. 181, Stip. 19-28). Further, Levy's work at the Public Citizen Litigation Group was not all legal in nature in that he engages in speaking engagements before various groups, although he does also engage in advising union members concerning union procedures with respect to internal union hearings and advises outside attorneys on cases in which the Public Citizen Litigation Group is not involved. (Id. ¶¶ 16 through 18).

While Fox' and Morrison's credentials are somewhat more impressive, as noted above (Doc. No. 181, Stip. ¶¶ 30-56; Doc. No. 182, Exh. P21, J-2, pp. 103-105), that is only one factor to be considered. Neither participated extensively in the matters involving the merits, and as noted above their time records are suspect; indeed, the

time requested for Morrison is based almost entirely on a reconstruction.

Sims has been employed by the Public Citizen Litigation Group since 1975 after service as a law clerk to a federal circuit judge. Although he would appear to have somewhat more experience than Levy (Doc. No. 177, Trial Tr. 192), his experience was not brought to bear upon the issues in this case. Rather, he has been in this case *solely* on the fee application. Apparently his first efforts were in connection with representing Levy in his July 1981 deposition in preparation of the hearing on the fee application. (Id. at 190-191). Rather, he does not specialize in labor matters, but rather, "general civil litigation." (Id. at 192).

There is nothing in this record concerning Bratton's background.

Further, this was not contingent fee litigation. All counsel, except Bratton, are employees of Public Citizen, Inc., and thus, did not risk any hours without a guarantee of remuneration for themselves.

The foregoing discussion relates primarily to the application for fees for work on the merits, although as noted previously the inadequacies of the records and other evidence involving time and allocations would also relate to a substantial part of the fee application time. With respect to fees requested for work on the fee application, it should be noted first that counsel's work on the fee application far exceeds the number of hours expended on the merits. In any case, IBT argues that notwithstanding any other deficiencies, counsel, as a matter of law, are not entitled to an award for fee application litigation in a case of this nature. IBT argues that since the underlying action in this case was brought under Title I of the Labor Management Reporting Disclosure Act, plaintiffs' counsel concede that their application for attorneys' fees is governed by the decision of the Supreme Court in Hall

v. Cole, 1973, 412 U.S. 1. IBT argues that, accordingly, any attorneys' fees award must be predicated upon the "common benefit" rationale set forth in *Hall* since there is *no statutory provision* for attorneys' fees in Title I, LMRDA suits. IBT argues that as the subsequent Supreme Court decision in Alyeska Pipeline Service Co. v. Wilderness Society, 1975, 421 U.S. 240, made abundantly clear, courts are prohibited from making *non-statutory* attorneys' fees awards to encourage *private attorneys general* and that, therefore, counsel in this case must rely exclusively upon the common benefit rationale for an award of attorneys' fees. IBT argues that under the common benefit doctrine, counsel may recover only costs associated with that portion of the litigation that creates the substantial benefit conferred upon the alleged class, and that this principle derives from the equitable "common fund" doctrine identical in theory and scope to "common benefit," Mills v. Electric Auto Light Co., 1970, 396 U.S. 375, at 392; Hall v. Cole, 412 U.S. at 5, n. 7, under which plaintiff may recover only costs of litigation that creates, preserves, or enhances a common fund. Lindy Bros. Builders, Inc. v. American Radiator, 3 Cir. 1976, 540 F. 2d 102, 110 (Lindy II); Copeland v. Marshall, D.C. Cir. 1980, 641 F. 2d 880, 896, n. 29. IBT argues that litigating the fee award entitlement will in no way benefit the plaintiffs in this case or other rank and file members, but redounds only to the benefit of the attorneys, citing Lindy II, supra, 547 F. 2d at 111, and Van Gemert v. Boeing Co., S.D. N.Y. 1981, 516 F. Supp. 412, 415. IBT argues, therefore, that since common benefit fees like common fund fees are deemed to come out of the plaintiffs' recovery, their attorneys' recoupment of a fee for fee litigation time is deemed to be adverse to the plaintiffs' interest and not a legitimate cost, citing *Lindy II*, supra. IBT argues, therefore, that the situation here is clearly distinguishable from those cases such as civil rights cases where there is a statutory authorization for fees and the purpose is to encourage private attorneys

general enforcement of the underlying statutory rights. (Doc. No. 174, pp. 40-44).

Although IBT has cited no authority directly on point that common benefit cases should be treated the same as common fund cases for purposes of determining whether *non-statutory* awards could be granted for fee litigation, the magistrate finds that this reasoning based on the cases cited is persuasive. Plaintiffs in their reply brief (Doc. No. 173) have not directly addressed this argument. However, in their original post-trial brief, filed simultaneously with the IBT's post-trial brief, they cited no authority which would support their position that fees for fee litigation would be awarded in a case of this type. (Doc. No. 171, pp. 24-36). Rather, addressing the same argument made in prior documents filed in this case, they attempt to distinguish *Mills*, supra, on the basis that in that case the Supreme Court ruled only that attorneys' fees would be available on a common benefit theory even if a shareholder derivative suit produced a substantial benefit to which it would be impossible to assign a monetary value, and did not purport to decide that the common benefit and common fund theories are identical *for all purposes*. (Id. at p. 26). However, the later case of Hall v. Cole, supra, seemed to recognize that the principles in common fund and common benefit cases are the same. 412 U.S. at 5-6, and n. 7.

Plaintiffs, once again zeroing in on the decision in *Mills*, supra, argue that even if it were correct that no fees can be awarded for time spent on fee applications in derivative shareholder suits that produced no monetary benefits, there are important differences between shareholder derivative suits and union democracy litigation, such as involved in this case, that would make such a principle inapplicable. Plaintiffs argue that despite the fact that a common benefit theory is involved in a derivative action, the results of the suit are ultimately translated into money which is gained or lost by the share-

holder, so that an award of fees arguably might harm the ultimate value of the shareholder's only interest, his property. Plaintiffs argue that on the other hand, union membership does not constitute a transferrable property interest, and the benefits produced by union membership run far beyond money alone. They argue that, accordingly, insofar as an award of attorneys' fees may contribute to democratic rights in a particular union, the fact that the award comes out of the union treasury which is supported by the members' dues does not mean that the members have suffered a loss. (Doc. No. 171, pp. 26-28).

The magistrate fails to appreciate this distinction. The courts have held that when union members' rights are vindicated by a decision on the merits against their union, they have all benefited, and thus, it is not improper for the non-suing union members to pay the legal fees to secure that benefit through an award out of the union treasury to which they have all contributed. However, services performed in connection with the fee application, while necessary to the attorney's recovery, confer no further benefit on the union members, and thus to require them to pay for fee litigation services, in addition to services relating to the merits for which they have already paid, does in that sense result in a loss. Van Gemert v. Boeing Co., supra.

Plaintiffs argue, however, that there is a second important difference between the legal services available to union members and those available to stockholders. They argue that there is an extensive plaintiff's bar that is available to service dissenting shareholders including attorneys who can afford to take on a large case in expectation of attorneys' fees to be recovered, and given the size of the recoveries and the amount of work that are often involved in such litigation, the attorneys' fees for work on the merits tend to be so large that even if the corporation's attorneys delay the eventual receipt of attorneys' fees by several years, the amount involved is

"worth the effort." (Doc. No. 171, p. 28). They argue that, on the other hand, as shown by the testimony of Gordon Haskell, the President of the Association for Union Democracy, there are few knowledgeable attorneys available to help union members who have problems with their unions, particularly where the matter at stake is an abstract civil right, such as freedom of speech, rather than a lost job. They argue that, accordingly, attorneys' fees awards are crucial to the availability of counsel to take union democracy cases. They point out that since fees became available, a small bar of two dozen or so lawyers nationwide has developed to take these cases, and thus fee awards provide a benefit to the union membership by guaranteeing that lawyers will be available to take their cases if they ever have a problem. They argue that as the court stated in Cole v. Hall, E.D. N.Y. 1974, 376 F. Supp. 460, 462, when awarding fees for litigation of the fee in question in the court of appeals and Supreme Court, the rights of union members granted under Title I of the LMRDA would be valueless without the means to vindicate them. They argue, therefore, that under these circumstances, fees may be awarded for time spent by plaintiffs' counsel in litigation not only of the merits, but of the fee question. (Doc. No. 171, pp. 28-32).

Plaintiffs have cited to no evidence which would support their argument that there is an extensive plaintiffs bar to serve dissenting shareholders, or that their work on the merits tends to provide large enough fees that they do not have to be particularly concerned with time spent on fee litigation.

With respect to the testimony of Haskell, for reasons more fully set forth at the hearing (Doc. No. 177, Trial Tr., pp. 10-35), Haskell was deposed subsequent to the hearing and his deposition was submitted as evidence to the court (Doc. No. 169). Haskell's testimony was being proffered as expert testimony with regard to the difficulty in securing legal assistance for union members

with internal problems (Doc. No. 177, Trial Tr. at 10), and it was contended that such evidence pertained to the question of attorneys' fees for *litigating an attorney fee application* to show that in fact there is a common benefit to be derived from the time involved in litigating a fee application. (Doc. No. 177, Trial Tr. 14-15).

IBT raised a question initially as to whether this was the type of area in which expert testimony was needed. (Doc. No. 177, Trial Tr. 12). However, to the extent that the proffered testimony may be relevant, the magistrate believes that the subject matter of the testimony required someone with specialized knowledge to assist the trier of fact to understand the evidence or determine a fact in issue. Rule 702, Fed. Rules of Evidence. This testimony, in the form of Haskell's deposition, will, therefore, hereby be admitted as Exh. P24. However, little or no weight will be afforded this testimony.

Haskell's educational background including a Bachelor's Degree in Political Science obtained some 42 years ago does not necessarily lend itself to establishing an expertise in the difficulty of obtaining counsel for rank and file members in union democracy cases, and he has had no other specialized training. (Doc. No. 169, pp. 4-5, 11, 24-25). Further, his employment experience does not go far to establish such expertise. He has worked for various political and social action groups over the years, primarily as a fund raiser or public relations officer. (Id. at 5-8, 12-13, 19-20, 34). Although he has been employed in the past by a civil libertarian organization, he admitted that seeking counsel for labor matters was not involved because these organizations did not consider internal union problems within the realm of the type of civil liberties to which their efforts should be directed. (Id., pp. 7, 17-19, 35-37). From 1959 to 1971, when he was director of the Development for CARE and director of the Polytechnical Institute of New York and Engineering School, Haskell had little if any involvement

in seeking legal counsel in Union Democracy matters. (Id. at 7-8, 17-22, 34). Haskell was never qualified to testify in court in this area of expertise and has not conducted a survey or otherwise gathered data to support his testimony. (Id. at 24, 27-28). In addition, Haskell testified that he has no knowledge whatsoever of any studies done in this area since the middle 1950's. (Doc. No. 169, at p. 35).

Further, Haskell is not a disinterested witness. As the President of the Association for Union Democracy (AUD) (Doc. No. 169, at 31), he has funded publishing projects for certain of the attorneys in this case (Id. at 55), and he has a continuing close working relationship with counsel in this case, some of whom are members of the AUD advisory board. (Id. at 28, 55, 58, 66, 102-103).

With respect to the substance of his testimony, much of it is in generalizations and conclusions. He testified that there were only two dozen attorneys in the United States who would be found for union democracy cases (Doc. No. 169, at 51), but when this statement was tested on cross examination, he could not name but 12; yet, he admitted to the existence of many more qualified attorneys who were apparently available, noting only that his organization had not had occasion to refer union members to many of these attorneys. (Id. at 56-84). He acknowledged the existence of groups other than his own which were available to provide referral services to aid individuals in their efforts to find counsel. (Id. at 56, 64-65, 71-72, 98). Despite earlier testimony that firms representing corporations or unions in labor matters would not be willing to take union democracy cases (Id., pp. 40-45), Haskell later acknowledged that certain corporate and union attorneys do, in fact, represent rank and file members. (Id. at 74, 80-87). Haskell also acknowledged that at the October 1980 Association for Union Democracy conference, which he helped coordinate (Id. at 31-

32, 63-64), Chip Yablonski, an attorney in Landrum-Griffin cases representing individuals, pointed out that "Title I has worked . . . because there has been an ample reservoir of lawyers . . . who stood willing to take risky cases for union members . . ." and also stated "there is a surplus of lawyers." (Id. at 89-91).

Even if the magistrate were to give this testimony some weight, as noted above, plaintiffs have cited to language in Cole v. Hall, supra, 376 F. Supp. 460, 462, in which, in awarding fees for the litigation of the fee question in the court of appeals and Supreme Court, the district court stated, "The rights of union members granted under Title I of the LMRDA would be valueless without the means to vindicate them." They argue that this language supports the proposition that fees may be awarded in common benefit cases for time spent on the fee question. However, counsel's services in that case went primarily to the question as to whether, under the LMRDA, non-statutory fees *could be awarded at all.* Until that time, there had been no precedent for awarding non-statutory attorneys' fees for even work on the merits. Moreover, in approving the fees for litigation of the fee issue before the appellate courts, the court in Cole v. Hall, supra, noted that in essence, plaintiff's counsel served as private attorney general, although the court noted that in Hall v. Cole, supra, 412 U.S. at 56, n. 7, the Supreme Court did *not* find occasion to reach plaintiff's attorney's claim to legal fees on the theory that he acted as a private attorney general vindicating a Congressional objective. 376 F. Supp. 462. Since that time, the Supreme Court has held that courts are *prohibited* from making *non-statutory* attorney fee awards to encourage *private attorneys general.* Alyeska Pipeline Service Co. v. Wilderness Society, supra, 421 U.S. 240. Thus, even if the magistrate were to give Haskell's testimony some weight, it is apparent that this testimony would seem to support a private attorney general theory, for which non-statutory attorney's fees for litigation of

the fee question should not be awarded in common benefits type cases. Alyeska Pipeline Service Co. v. Wilderness Society, supra.

Plaintiffs argue, however, that there is a great temptation for IBT to litigate the fee question at such great length as to make the fee awarded scarcely worth the trouble if fees are to be awarded only for time spent on security the common benefit, but not for securing fees and that if this is done with any regularity, attorneys would be unwilling to represent union members in suits under Title I. They argue that this "stonewalling" approach would have been demonstrated by proffered evidence of IBT's position in settlement negotiations concerning the merits and the fee application, and that the magistrate erred in excluding evidence about the refusal to negotiate. (Doc. No. 171, pp. 33-37).

As the plaintiffs appear to concede by this argument, there is little evidence of record regarding the alleged stonewalling approach. It is true that the magistrate ruled out proffered testimony on settlement negotiations, partly because what a party may be willing to concede or not concede in such negotiations would not mean that he did not have a firm belief in his position and in any event this testimony could distort the views of the trier of fact in reaching a fair and impartial decision. Also, from the offer of proof at the hearing, it was difficult to determine the relevance. Sims indicated that while plaintiffs did not want to get into any long legal argument about the significance of every twist and turn in the negotiations, testimony as to the general nature of negotiations was relevant to the issue of allocation of responsibility between parties as to Count I, that is, to show that the real dispute was with IBT on that Count and that IBT should be made to pay attorneys' fees related to that Count. (Doc. No. 177, Trial Tr. 108-120).

In the plaintiffs' *post-trial* proposed findings of fact, plaintiffs set forth in more detail as to what they had

expected to prove, and this goes farther than that discussed at the hearing. (See Doc. No. 170, ¶¶ 135-141, 151, 181-191, 195). Further, they *now* argue that this excluded evidence is relevant to their "private attorneys general" approach to the question of the allowance of non-statutory fees for litigating the fee question in common benefit cases. (Doc. No. 171, pp. 33-37). As noted above, the magistrate believes that as a matter of law, they are not entitled to fees for fee litigation purposes. Further, the cited (excluded) evidence does not support a "stonewalling." Plaintiffs state that after the motion of Greenawalt and Local 764 was denied, those parties offered to cancel the fine and hold in abeyance any future enforcement of IBT Constitution Article XIX, Sec. 12 (b), until the lawfulness of that provision were determined in the appellate courts. There is no indication IBT was a part of these discussions, and in any event, *plaintiffs* refused the offer, fearing that IBT would argue that the controversy was moot. (Doc. No. 170, ¶¶ 134-139). It appears that the only other thing plaintiffs might have been offered is that the provision would never again be enforced, locally or nationwide, which would amount to capitulation, not negotiation.

Although plaintiffs claim that IBT would not negotiate the fee question until after the application was filed, there is some indication that a month before the hearing, IBT indicated an interest in discussing a settlement. (Doc. No. 170, ¶¶ 184-191). Although plaintiffs indicate that IBT never made a counter-offer to plaintiffs' (unspecified) descending offers (Id., ¶ 191), it should be remembered that IBT was not told until the eve of the hearing that plaintiffs were limiting their demands to Count I, and in view of the legal and factual problems discussed above, and in the absence of information on plaintiffs' "descending demands," there is no way to determine if the demands were reasonable enough to have justified an offer by IBT.

II

As noted above, plaintiffs' counsel seek an award of fees against defendants Greenawalt and Local 764, related to matters litigated under Count II of the complaint. With respect to that Court, the parties entered into a partial settlement agreement which provided, in pertinent part, that attorneys' fees and costs and a stated amount would be awarded if, and only if, the court should determine that plaintiffs were the prevailing parties on Count II, and that the litigation of Count II created a common benefit of the local membership. The partial settlement also provided that certain additional amounts would be awarded if the court determines that plaintiffs are entitled to counsel fees from IBT attributable to their efforts in pursuing the *fee application*, and to that extent, the partial settlement agreement was contingent upon matters in issue on plaintiffs' application for an award of attorneys' fees aginst the IBT on Count I.

The partial settlement incorporated therein a brief stipulation of the facts supported by appendices and "all pleadings, briefs, and orders and other matters entered in the docket concerning Civil Action No. 78-1035." Since this stipulated "record" is necessarily broad, and since the parties do not appear to have any real dispute regarding the facts, but rather present legal argument, the magistrate will attempt to set forth the facts as gleaned from the stipulation and the briefs of the plaintiffs and Local 764. (Doc. Nos. 164, 167, 178).

Local 764's by-laws provide that amendments must be introduced at the January membership meeting, read and debated at the February and March meeting, and put to a vote at the April meeting. In January 1978, Pawlak and Stafford and several other rank and file members of Local 764 proposed numerous amendments to the by-laws of Local 764. Prior to the April 1978 membership meeting, Greenawalt wrote the membership

a letter on Union stationery, expressing his view as Chief Executive Officer of the Local that adoption of the proposed amendments would not be in the best interest of the Union, and counseled the rank and file to withhold their support from the amendments. Pawlak, on behalf of both plaintiffs, demanded that Greenawalt and the Local Executive Board provide them an opportunity to send, at Union expense, a counter-mailing to all rank and file members expressing support for such amendments. This request was denied. At the meeting, the amendments were rejected by the Union membership.

Following these events, on October 23, 1978, plaintiffs filed the instant action. Count II of the complaint with which we are here concerned addressed the Local's conduct in the 1978 by-laws referendum. Plaintiffs allege that in January 1978 they proposed numerous amendments to the Local's by-laws; that the amendments were read and discussed at the February and March meetings, each attended by approximately 100 members which was substantially more than the usual attendance; that before the April 1978 meeting, Greenawalt published and mailed to all members of Local 764 at Union expense a leaflet attacking the proposed amendments and urging members to attend the next membership meeting and vote against the amendments; that the leaflet, among other things, indicated that counsel for the Local had given their opinion that the amendments would harm the Local; that Pawlak, on behalf of both plaintiffs, asked Greenawalt to provide them an equal opportunity to send, at Union expense, a counter-mailing to all Local 764 members, but this request was refused; that plaintiffs also asked for the Union's cooperation so that they could have an opportunity to send a mailing at their own expense to the full membership to explain the proposals prior to any vote, but that this request was also refused; that plaintiffs also asked to see the opinions of counsel to which Greenawalt had referred, but this request was refused; that the Greenawalt mailing induced the attendance at

the April 9 meeting of over 300 members who had neither attended the earlier meetings nor heard the amendments debated, and whose only source of information concerning the intent and effect of the amendments had been the mailing; that prior to the vote, defendant Greenawalt denied plaintiffs the opportunity to explain their proposals to those attending; and that the amendments were defeated by approximately 300 votes. (Doc. No. 1).

With respect to these allegations, plaintiffs sought (1) an order declaring the April 9, 1978, vote on the proposed amendments to be null and void; (2) an order requiring the defendants to conduct a second vote on the proposed amendments, to afford the entire membership an equal right and opportunity to participate in the Local's deliberations in voting on the amendments and to give plaintiffs the opportunity to publish and mail, at Union expense, a leaflet supporting the proposed by-law amendments; and (3) an award of costs, including reasonable attorneys' fees. (Doc. No. 1).

Shortly after the complaint in this action was filed, plaintiffs in January 1979 submitted a second set of numerous proposed by-law amendments. A vote on these second proposals was scheduled for April 1979. In January 1979, Pawlak and Stafford asked to be permitted, at Union expense, to mail to the whole membership of Local 764 a leaflet explaining the by-law amendments and advocating a vote in favor of their proposals. Greenawalt responded by letter dated February 12, 1979, indicating that he might agree to plaintiffs' requests, subject to certain conditions stemming from his concern that the letters, in violation of the LMRDA, might be used to promote candidacy of any person for Union office. In March 1979, plaintiffs felt that Greenawalt would again mail the Local membership a letter containing his advice on the proposed by-law amendments, and as a consequence, plaintiffs sought a temporary restraining order prohibiting Greenawalt from such a mailing.

There were continuing negotiations between plaintiffs and Local 764 concerning such a mailing. Plaintiffs made several demands of the Local. First, they demanded that in the event Greenawalt mailed an open letter to the membership addressing his opinions as President about the amendments, they too, should be permitted to include in the envelope a letter explaining the by-law proposals and advocating a favorable vote. Plaintiffs demanded that Local 764 pay for the printing of their letter. When this demand was denied, plaintiffs offered as a possible compromise to pay one-half of the costs of preparing and mailing their advocacy letter up to $500. Local 764 refused, however, to pay any of the costs of mailing plaintiffs' advocacy letter.

A hearing was held before Judge Muir on March 28, 1979, concerning the plaintiffs' request for a temporary restraining order prohibiting Greenawalt from expressing his views on the amendments to the membership by a mailing paid for by the Union. Judge Muir denied the TRO application. (Doc. No. 41).

Subsequently, on April 2, 1979, Greenawalt printed and mailed at Union expense a 2 page letter in which he expressed his views that the proposed amendments would hurt the Local and advised the membership to vote against these amendments. At the April 8, 1979, monthly membership meeting of Local 764, the amendments were rejected by the membership.

On June 22, 1979, the parties filed with the court a proposed order settling Count II which was approved by Judge Muir on June 26, 1979. With respect to Count II, Local 764 and plaintiffs agreed as follows: (1) Count II is dismissed without prejudice and plaintiffs waived any rights to damages predicated upon the allegations contained in Count II; and (2) if plaintiffs offer by-law amendments in 1980, the following procedure would be applicable: if any Union resources were expended, plaintiffs would be afforded equal and equivalent Union re-

sources to conduct their campaign on by-law proposals as may be afforded to any other person including the officers of Local 764. In particular, no mailing was to be sent to the membership at Union expense unless plaintiffs were afforded an opportunity at Union expense to prepare and *insert* a letter in the mailing expressing their views on the by-laws proposals. Furthermore, plaintiffs were given the opportunity to examine, but not duplicate, the Local membership list and the Local agreed to make its computerized membership list available to a mailing service to send mailings at *plaintiffs' expense* to Local members expressing their views on the by-law proposals. In the event no by-law amendments were filed in 1980, the above agreement was to be considered inapplicable. (Doc. No. 69).

Subsequently in January 1980, plaintiffs proposed a third set of by-law amendments, not nearly as numerous as the 1978 and 1979 proposals. In the 1980 by-laws campaign, plaintiffs either could not or did not avail themselves of any of the licenses granted them under the settlement agreement. The Union sent out no mailing and as a result, Pawlak and Stafford were unable to insist on the use of Union funds to finance their own views. Plaintiffs, however, could have prepared their own advocacy letter at their personal expense and the Local would have guaranteed its distribution to the entire membership through permitting plaintiffs to have access to its computerized mailing lists. Plaintiffs, however, did not avail themselves of this part of the settlement agreement.

In 1980, Pawlak ran for the office of President of Local 764 against Greenawalt, and Stafford ran for the office of Vice-President. Both men were defeated.

No by-law proposals were offered in 1981.

Local 764 argues that the basic prerequisites to any award of counsel fees are (1) plaintiffs must be the pre-

vailing party; and (2) the result achieved by plaintiffs must have conferred a substantial benefit upon the entire Union membership as opposed to benefiting plaintiffs alone. Local 764 recognizes that although Hall v. Cole, supra, 412 U.S. 1, did not specifically incorporate the "prevailing party test," the language in that case to the effect that a plaintiff's *successful* litigation conferring a substantial benefit on the membership justifies a fee award suggests that a "prevailing party test" as well as the "substantial benefit test" must be met. In that regard, they cite to language in Kerr v. Screen Actors Guild, 9 Cir. 1975, 526 F. 2d 67, and Benda v. Grand Lodge, IAM, 9 Cir. 1978, 584 F. 2d 308, both of which were LMRDA cases preceding Hall v. Cole, and which refer to or, in effect, refer to, the prevailing party test. (Doc. No. 167, pp. 14-15, 26). Plaintiffs on the other hand contend that they must satisfy only the substantial common benefit test, but argue in the alternative that the plaintiffs are the prevailing parties. (Doc. No. 164).

The magistrate believes, at least on this record, that the prevailing party test merges into the substantial benefit test. Even under statutes such as the Freedom of Information Act which incorporates a prevailing party test, these statutes provide that fees may be awarded where the complainant has "substantially" prevailed. See 5 U.S.C.A. § 552(a)(4)(E). It seems, therefore, that if a plaintiff's action has conferred a "substantial" common benefit, then he has "substantially" prevailed. On the other hand, if no substantial common benefit has been conferred, it is difficult to see how a plaintiff could be considered to have "substantially" prevailed. Further, a review of the briefs of the parties indicates that matters going to either test are substantially the same. The magistrate, therefore, will limit this discussion to the substantial common benefit test.

The benefits achieved by the plaintiffs must be discerned primarily from the consent decree. In United

States v. Armour & Co., 1971, 402 U.S. 673, 682, the Supreme Court has limited the conclusions and inferences that should be drawn from a consent decree. The Supreme Court noted that because the defendant has by the decree waived his right to litigate the issues raised, a right guaranteed to him by the due process clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written and *not* as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

The consent order gave little in the way of the relief sought in the complaint. Count II was dismissed and the right to obtain damages was waived. The consent order did not invalidate the April 1978 by-laws vote, nor does it order a second vote as requested in the complaint.

Plaintiffs were given the right to inspect, but not copy, the Local's membership roster. They were also given the right to have sent, at their own expense by the use of the Union's computerized mailing list, a leaflet to the membership supporting their views as to the by-laws. Plaintiffs did not avail themselves of these rights.

The only other benefit that plaintiffs received was an agreement that *if* the Local sent a mailing to the membership concerning its views on the proposed by-laws, plaintiffs could have inserted at Union expense their leaflet in the *same* envelope. The Local, however, made no mailing, and thus under the terms of the consent order, plaintiffs gained no benefit.

These very limited concessions of which the plaintiffs either did not, or could not, avail themselves were personal to the plaintiffs. There was nothing that granted these concessions to other rank and file members. Further, under the terms of the consent order, these benefits accrued to plaintiffs for the year 1980 only. No other union members, either before, during, or after

1980, could avail themselves of even these limited concessions.

Plaintiffs argue that a substantial common benefit conferred by these limited concessions was a guarantee that a fair process would be followed in deciding whether plaintiffs' by-laws proposals should be adopted. They argue that the injury to plaintiffs, who were denied the right to conduct a by-law campaign on a fair and equal basis, was also an injury to the membership which had to decide on the basis of the campaign whether and how to vote, and that accordingly, by forcing the Union to allow a fair and equal campaign, plaintiffs conferred a benefit on the membership as a whole. (Doc. No. 164, pp. 13-15). It is difficult to see how this "abstract" benefit could be considered a substantial benefit. As plaintiffs recognize, at the meeting in April 1980, plaintiffs' by-law proposals were defeated "by a large margin once again." (Doc. No. 164, pp. 5-6). No evidence has been presented as to why the Union did not send out a mailing prior to the April 1980 meeting. However, even assuming that its purpose was to deny the plaintiffs the right to insert their own leaflet in any such mailing, the result was that the Union membership did not have the views of either their own leadership or the plaintiffs with regard to the by-law proposals. In a sense, this litigation influenced the Union leadership to forego their right and responsibility, during the 1980 by-laws campaign, to lead and to give the members the benefit of their advice on questions that arise. See Sheldon v. O'Callaghan, 2 Cir. 1974, 497 F.2d 1276, *cert. denied*, 1975, 419 U.S. 1090. That certainly could not be deemed to have benefited the Local membership. Moreover, plaintiffs did not avail themselves of the other concession in the consent order, that is, to mail at their own expense their arguments to the Local membership even in the absence of a mailing by the Local. Nevertheless, as plaintiffs recognize, the proposed 1980 amendments were defeated as soundly as the 1978 and 1979 amendments when the

membership had available to it only the views of its leadership.

On the basis of the foregoing, it is respectfully recommended that:

(1) As to the application for fees against IBT on Count I,

(a) The application for fees and costs be denied for failure of plaintiffs' counsel to keep adequate records and to make proper allocation among claims and parties. (Report, pp. 9-20).

(b) In the alternative, if the court finds that some fees should be awarded, the award, as a matter of law, should be limited to fees and costs for work on the merits. (Report, pp. 36-46).

(c) If recommendation (1)(b) is accepted, the fee awards should be as follows. (Report, pp. 20-32).

	Hours (Rep., p. 6)	Rate (Rep., pp. 20-32)	Total
Levy	154¼	$50	$7,712.50
Fox	15½	$75	1,162.50
Morrison	17½	$75	1,312.50
Bratton	2	$50	100.00

(d) If recommendation (1)(c) is accepted, the awards should be reduced by 25% by reason of (1)(a) above, and other factors (Report, pp. 32-35) as follows:

Levy	$7,712.50	− 1,928.13 =	$5,784.37
Fox	1,162.50	− 290.63 =	$871.87
Morrison	1,312.50	− 328.13 =	$984.37
Bratton	100.00	− 25.00 =	$75.00

(e) If recommendation (1)(b) is accepted, the costs award should be $1,036.59. (Doc. No. 182, Exh. P8).

(f) If recommendation (1)(e) is accepted, the award should be reduced by 25% by reason of (1)(a) above, as follows:

$1,036.59 — $259.15 = $774.44

(2) As to the application for fees against Local 764 on Count II:

(a) The application for fees and costs should be denied as a matter of law because the work on Count II produced no substantial common benefit. (Report, pp. 46-55).

(b) In the alternative, if the court finds there was a substantial common benefit, an award of fees and costs should be made against Local 764 only in the sum of $4,000. (Partial Settlement, Doc. No. 178, ¶¶ 1, 5).

(c) No award of fees or costs should be made for work on the fee application. (Recommendation (1)(b) above; Partial Settlement, Doc. No. 178, ¶¶ 7(a) and 7(b)).

/s/ Raymond J. Durkin
RAYMOND J. DURKIN
United States Magistrate

Dated: January 29, 1982

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

vs.

CHARLES E. GREENAWALT, *et al.*,
Defendants

Complaint Filed 10/23/78

(Judge Muir)

JUDGMENT

May 21, 1982

The Court having made an independent review of the record and having considered the respective contentions of the parties in its Opinion and Order dated May 20, 1982,

IT IS ORDERED AND ADJUDGED that judgment be and hereby is entered in favor of the Petitioners, Attorneys Levy and Fox, and against the Defendants, Charles E. Greenawalt, et al, in the amount of $32,592.84.

Dated at Williamsport, Pennsylvania, this 21st day of May, 1982.

/s/ Donald R. Berry
DONALD R. BERRY
Clerk of Court

By /s/ D. Plesce
Deputy Clerk

APPROVED:

/s/ Muir
MUIR
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

vs.

CHARLES E. GREENAWALT, *et al.*,
Defendants

Complaint Filed 10/23/78

(Judge Muir)

OPINION

[May 20, 1982]

MUIR, District Judge.

This action was initiated by the filing of a complaint on October 23, 1978 in which it was alleged that fines imposed by Defendant International Brotherhood of Teamsters (International) against John Pawlak and James Stafford, members of Local 764, were invalid and that By-law referendum campaign procedures of the Local 764 and the actions of Charles E. Greenawalt were improper. On September 27, 1979, the Court granted Plaintiffs' motion for summary judgment as to Count 1 of the complaint; the matters involved in Count 2 were the subject of a settlement agreement reached by Plaintiffs and Local 764. Thereafter, International appealed the grant of summary judgment. The issue of an award of attorney's fees and costs was reserved by order of this Court of November 6, 1979 until the appeal could be concluded.

The Court of Appeals affirmed this Court's judgment on August 20, 1980 and the Supreme Court denied a petition for a writ of certiorari on January 12, 1981. On April 13, 1981, Plaintiffs filed the application for

an award of attorneys' fees and costs which is now before the Court. The Court referred the matter on April 27, 1981 to United States Magistrate Raymond J. Durkin for his report and recommendation concerning the application. Magistrate Durkin filed his report on January 29, 1982 and Plaintiffs and International filed exceptions to the report on February 16, 1982 and February 11, 1982 respectively. Thereafter, on February 19, 1982, International filed a response to Plaintiffs' exceptions to the Magistrate's report and on February 22, 1982 Plaintiffs filed a memorandum in opposition to the exceptions of International.

In their application of April 13, 1981, Plaintiffs seek an award of attorney's fees in the amount of $33,844.35 and an award of costs in an amount of $1,578.66. The amount of fees sought subsequently increased as the attorney's fees application proceedings eventually consumed over 300 hours of counsels' time. Plaintiffs' attorneys, with the exception of local counsel, Bruce F. Bratton, are employed by Public Citizen Litigation Group which is an arm of Public Citizen, Inc., an umbrella organization which engages in a wide variety of activities, including lobbying, publishing, education, research, organizing and litigation. All of the funding for the Public Citizen Litigation Group is received from Public Citizen, Inc. and the individual attorneys employed by Public Citizen Litigation Group will not directly receive any of the attorneys' fees awarded in this case.

In his full and exhaustive report, Magistrate Durkin recommends, first, that the application for fees and costs be denied as to both counts of the complaint. In the alternative, the Magistrate recommends that Plaintiffs be awarded a total of $10,287.50 on Count 1 and that that award be reduced by 25% because of counsels' failure to keep adequate records and to make proper allocation among claims and parties. Magistrate Durkin's alternative recommendation as to Count 2 is that Plaintiffs be awarded fees in the amount of $4,000.00 in conformity with the terms of the partial settlement of

Count 2 reached by the parties. Finally, if an award of costs is to be made, Magistrate Durkin recommends that such an award in the amount of $1,036.59 be reduced by 25% to a total of $774.44 and that no award of fees or costs be made for work performed on the fee application as to Count 2. Based upon a *de novo* review of the record and for the reasons stated below, the Court will not accept Magistrate Durkin's recommendations. 28 U.S.C. § 636(b)(1) (Supp. 1982).

The fee petition is divisible into two parts. Plaintiffs seek an award against International on the basis of matters litigated under Count 1 of the complaint only. They seek an award of fees against Charles Greenawalt and Local 764 concerning the matters litigated under Count 2 of the complaint only. Each aspect of the fee award will be discussed separately below.

I. Fee Petition as to Count 1 and International.

John Pawlak, a member of Local 764, filed an action in this Court complaining about a change in his working conditions at the place of his employment, and more specifically alleging that Local 764 had violated its duty of fair representation by failing to process his grievance concerning the change. This Court dismissed the complaint on the ground that Pawlak had not exhausted internal remedies before filing suit. Pawlak then attempted to pursue his grievance through the union's internal channels, but his charges were dismissed by the Executive Board of Local 764, and he did not pursue them further. Thereafter, Local 764 filed internal charges against Pawlak, accusing him of violating Article XIX, sections 6(1) and 12(b) of the Constitution of International. Pawlak was charged with having sued Local 764 without exhausting internal remedies thereby causing the Union to expend $2,635.00 defending the suit, and, following a hearing before the Local Union Executive Board, Pawlak was fined the sum of $2,635.00. In this action, Count 1 of the complaint challenged the validity of that fine on the grounds that (1) the fine un-

lawfully limited Pawlak's right to sue under the Labor Management Reporting Disclosure Act, § 101(a)(4), 29 U.S.C.A. § 411(a)(4) and (2) that Pawlak had been denied a fair hearing by the union tribunals.

On the parties' motions for summary judgment, this Court held that Article XIX, § 12(b) was a limit on Pawlak's right to institute a court action and thus as a violation of 29 U.S.C. § 411(a)(4) it was invalid. The Court enjoined Defendants from collecting the fine and enforcing § 12(b) of Article XIV of the International Constitution. The Court also granted the Plaintiffs' motion that the court order be publicized in an appropriate manner with a view toward notifying all locals and members of the Court's decision. The publication was ordered because the existence of § 12(b) had a chilling effect on the exercise of the members' right to file suit. Pawlak vs. Greenawalt, 477 F.Supp. 149 (M.D. Pa. 1979) *aff'd* 628 F.2d 826 (3d Cir. 1980).

A threshhold question in an action for attorney's fees under Title 1 of the Labor Management Reporting Disclosure Act, 29 U.S.C.A. § 412, is whether the litigation has conferred "a substantial benefit on members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Hall vs Cole, 412 U.S. 1, 5 (1970), *quoting* Mills vs. Electric Auto-Lite, 396 U.S. 375 at 393-394 (1970). The requirements under the common benefit doctrine are (1) that the benefits be traced with some accuracy, (2) to a class of beneficiaries which is basically identifiable and (3) that there be a reasonable basis for confidence that the costs may be shifted with some precision to those benefitting. Marshall vs. United Steelworkers of America, No. 81-1032 (3d Cir. Dec. 16, 1981).

The resolution of the allegations contained in Count 1 of the complaint in this matter unquestionably conferred upon all of the membership of International at the very

least the benefit of removing a chill cast upon the rights of all union members to institute court actions in order to vindicate their rights. Although International objects to Magistrate Durkin's analysis of the common benefit doctrine with regard to this matter, no argument has been submitted in support of that objection. The Court is not persuaded that such a benefit had not been afforded the union membership at the resolution of the controversy stated in Count 1. Further, the costs which the Court will award today will be borne by the union members who are benefitted by this action.

Having established that Plaintiffs have met the requirements of Hall vs. Cole, 412 U.S. 1 (1970), the question remains in what amount an award should be made. Plaintiffs' counsel submitted that the hours expended by them on the prosecution of this matter were as follows:

TIME THROUGH MAY 27, 1981

	Levy pre-1/1/80	Levy post-1/1/80	Fox	Morrison	Bratton	Sims
Time spent on Count 1 only	64.25	38	9	17.50		
Time spent on both Counts	104.25		13		4	
Half of time spent on both Counts	52		6.50		2	
Time spent on atty. fees		51.75	2.75	2.50		
Half of atty. fee time		25.75	1.25	1.25		
Total time for which fee is sought	116.25	63.75	16.75	18.75	2	
TIME 5/28/81 TO 8/9/81						
		112	20	8.75	0	18.67
TIME 8/10/81 TO 11/8/81						
		69.25	25.75	1.25		19

RECAP

	Levy	Fox	Morrison	Bratton	Sims	Total
Time on Merits	154.25	15.50	17.50	2	—	189.25
Time on Attys. Fees	207	47	11.25	—	37.67	302.91

Magistrate Durkin was extremely concerned, as this Court is as well, with counsels' record keeping of their time spent on this action. However, unlike Magistrate Durkin, the Court is of the view that the records kept by counsel Levy and Fox are adequate in most respects to support the award of fees for the time reflected in those records and that the time is also adequately allocated by counsel between the counts. This Court's practice order with regard to the maintenance of concurrent time records in support of applications for attorney's fees is explicit. It is not intended to foreclose an award of fees based upon valid applications for the same. Hours submitted by counsel Bratton, Sims and Morrison, none of whom kept any time records whatsoever, will be disallowed entirely.

Additionally, the Magistrate found that counsel should not be awarded fees for the time spent by them on the application for the attorney's fees award. As the Plaintiffs point out in their objections to the Magistrate's report, it is the general rule that recovery of fees for work done to obtain an award of fees is permissible. In Lindy Bros. Builders, Inc. vs. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) and Van Gemert vs. Boeing Company, 516 F. Supp. 412, 415 (S.D.N.Y. 1981), cases relied upon by the Defendants, the attorneys' fees awards contemplated were to be deducted from a common fund created by counsel's efforts, thus rendering the interests of counsel in the fee application wholly adverse to the interests of the beneficiaries of the fund. Since there could be no benefit to the fund for the services performed by counsel in con-

nection with the fee application, the Court reasoned there should be no attorney's fees award from the fund for those services. Lindy Brothers Builders, Inc. vs. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 111 (3d Cir. 1976). In the present case, however, the benefit which has been secured for the plaintiffs and the "class" of union members to which they belong is not a sum of money but rather is an affirmation of the civil rights of union members. In such a case, given the importance of the Plaintiffs' willingness to vindicate their own and other members' rights counsel are entitled to an award of fees from the union treasury. Hall vs. Cole, 412 U.S. 1 (1973), *on remand*, 356 F.Supp. 460 (E.D. N.Y. 1974). Finally, the recovery of attorney's fees from the union treasury is distinguishable from the "common fund" exception discussed above in that the union members benefited will, as a group, continue to derive benefits from the future effects of an award against the union treasury. For all of these reasons, Plaintiffs' application for the inclusion in the lodestar of an amount representing time spent by counsel on the attorney's fees application will be granted. *See* Shimmen vs. Frank, 625 F.2d 80 (6th Cir. 1980); Bise vs. International Brotherhood of Electric Workers, 618 F.2d 1299 (9th Cir.), *cert. denied*, 101 S.Ct. 279 (1979).

In the computation of a lodestar, the Court must determine the reasonable hourly rate of pay to award each attorney on whose behalf fees are sought. In the present matter, the Magistrate found, although the testimony of Plaintiffs' counsel was undisputed, that the rates sought by them were exaggerated. Those rates sought are as follows:

Levy (pre-January 1980)	$65.00
Levy (post-January 1, 1980)	75.00
Fox	90.00
Morrison	90.00
Sims	80.00
Bratton	50.00

Based upon the Court's consideration of the undisputed facts of record in this matter together with the testimony given by Plaintiffs' counsel and their affidavits submitted in support of the application for attorneys' fees, the Court is of the view that the hourly rates for Levy and Fox are reasonable rates for attorneys similarly situated geographically and in terms of experience, education, and quality of the work performed. Since no fees will be awarded for time spent by attorneys Morrison, Sims and Bratton, their hourly rates need not be considered further. While Magistrate Durkin was apparently concerned as well with the fact that Plaintiffs' counsel are members of the Public Citizen Litigation Group who are paid by salary, this factor does not prevent the Court from finding the rates requested by counsel to be realistic. *Cf.* Barrett vs. Kalinowski, 458 F.Supp. 689, 703 (M.D. Pa. 1978) (value of Legal Services attorneys' work set at $40.00 per hour). Additionally, there is no evidence in this matter that the rates requested by Plaintiffs counsel are improper. The lodestar will be calculated on the basis of the total hours expended by each of Levy and Fox, multiplied by the hourly rate requested by him as follows:

	Hours	Rate	
Levy (pre-January 1, 1980)	116.25	65.00	7556.25
Levy (post-January 1, 1980)	245.00	75.00	18375.00
Fox	62.5	90.00	5625.00
Total			$31556.25

The next issue to be resolved in this matter is the propriety of the application of a multiplier of 1.5 as requested by counsel for the Plaintiffs. In determining whether the lodestar fee should be increased to reflect the contingent nature of success of this action or the quality of the work performed or both, the Court may consider the burden borne by the Plaintiffs' counsel in the case, the legal and factual complexities of the action, the probability of the Defendants' liability, the risks taken in developing the case, including the hours expended

without guarantee of remuneration, the amount, if any, of out-of-pocket expenses advanced by the attorneys, their development of prior expertise in the area, and whether there was a delay in receipt of payment by the attorneys. *See e.g.* In Re Anthracite Coal Antitrust Litigation, 81 F.R.D. 499, 510511 (M.D. Pa. 1979).

Although this case has gone on interminably, the Court is not convinced that it involved, from the outset, complex issues or questions of fact Since Plaintiffs' counsel are members of the Public Citizen Litigation Group it is also not clear what risks, if any, were borne by them in developing the case or in expending monies on the action. While it is apparent that counsel for the Plaintiffs have developed an expertise in the area of litigation under the Labor Management Reporting Disclosure Act, and that such expertise is evidenced by the quality of their work, the Court is not persuaded that this one factor standing alone is enough to warrant the application of the multiplier requested. From the record of this case, and more particularly the record of the fees application proceedings, it cannot be said that Plaintiffs' counsels' energies were expended even predominantly on meritorious matters deserving of their expertise in the labor-management relations field. The Court is of the opinion that Plaintiffs' counsel will be adequately compensated by an award to them of the lodestar fee alone. No multiplier will be employed. To the extent that International has objected to Magistrate Durkin's admission into evidence of "expert" testimony going to the question of the use of a multiplier, the Court's decision not to apply one renders International's exception moot.

Plaintiff's counsel also seek reimbursement of costs to them in prosecuting this action in the amount of $1578.66 Magistrate Durkin found and Plaintiffs' counsel's testimony is to the effect, that $1,036.59 of that amount was expended on matters relating to Count 1 only. Since there is no specific objection to this finding and it appears to be supported by the record, the Court

will award Plaintiffs' counsel reimbursement of costs in the amount of $1,036.59 on Count 1.

II. Fee Petition as to Count 2 and Local 764 and Charles Greenawalt.

In Count 2 of the complaint, Plaintiffs claimed that Local 764 and Charles A. Greenawalt denied them an equal opportunity to be heard on the proposed amendments to the Union's by-laws during 1978. The claims in Count 2 were settled by the parties on June 26, 1979. By the execution of a document on that date it was provided that in exchange for dismissal of Count 2 without prejudice and the Plaintiffs' waiver of the right to any damages predicated upon the allegations contained in Count 2, the Plaintiffs would, if they offered any by-law amendments in 1980, be entitled to expend equal and equivalent union resources to conduct their campaign on the by-law proposals as would be afforded any other persons including the officers of Local 764. In particular it was provided that no mailing was to be sent to the membership at union expense unless Plaintiffs were afforded an opportunity at union expense to prepare and insert a letter in the mailing expressing their views on the by-law proposals. Thereafter, Plaintiffs and the Count 2 Defendants reached a settlement agreement as to an attorney's fees award against the Count 2 Defendants which provides that if on the record stipulated, *See* Document 178, the Court determines that the Plaintiffs were the prevailing parties on Count 2 and that the litigation of Count 2 created a substantial common benefit for the local membership, the Local 764 will pay Plaintiffs' counsel fees in the amount of $4000.00. Accordingly, in the Court's view it is necessary for the Court to determine for purposes of the motion for an award of attorney's fees as to Count 2 only the "substantial benefit" and "prevailing party" questions concerning Count 2.

With regard to Count 2, Magistrate Durkin found that the settlement reached by the parties conferred upon the plaintiffs a minimal benefit which was not sufficient to warrant a finding that the Plaintiffs had prevailed on Count 2. The Court disagrees with the Magistrate's view. The concession that if union executives desire to state their opinions as to by-law amendments proposed, then the executives of the union must give union members "equal time" to express *their* views at union expense is significant. The facts of Count 2 came into existence after union leadership had advised the union membership as to their views of proposed by-law amendments suggested by the Plaintiffs and without affording the Plaintiffs an opportunity to respond. Thus, in the Court's view, the benefit conferred upon the Plaintiffs and other union members by the settlement reached in Count 2 embraces precisely the relief sought upon the filing of the complaint and the Plaintiffs are the prevailing parties here. Furthermore, the benefit conferred must be viewed as substantial for purposes of the award of attorney's fees under Hall vs. Cole, 412 U.S. 1 (1970).

An appropriate order will be entered as to Count 2 which states the Court's conclusion that the Plaintiffs were the prevailing parties as to Count 2 and that the resolution of the matters contained in Count 2 by way of the settlement reached by the parties did create a substantial common benefit for the local membership.

An appropriate order as to the award of attorney's fees on Count 1 will also be entered.

/s/ Muir
MUIR
U.S. District Judge

Dated: May 20, 1982

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

vs.

CHARLES E. GREENAWALT, *et al.*,
Defendants

Complaint Filed 10/23/78

(Judge Muir)

ORDER

[May 20, 1982]

1. Petitioners, attorneys Levy and Fox are awarded the sum of $31,556.25 in fees for matters litigated in Count 1.

2. Petitioners are also awarded $1,036.59 as costs and expenses relating to Count 1 for a total award of $32,592.84.

3. Plaintiffs were the prevailing party on Count 2 of the complaint.

4. The resolution of the matters contained in Count 2 of the complaint conferred a substantial benefit upon the membership of the local union.

5. The Clerk of Court shall send a copy of this opinion and order to Magistrate Durkin.

/s/ Muir
MUIR
U.S. District Judge

Dated: May 20, 1982

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

vs.

CHARLES E. GREENAWALT, *et al.*,
Defendants

Complaint Filed 10/23/78

(Judge Muir)

ORDER

June 28, 1982

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On May 20, 1982, this Court entered an opinion and order in which it disposed of a request for the award of counsel fees and expenses by the Plaintiffs. On May 21, 1982, judgment was entered for the amounts awarded by the Court in its order of May 20, 1982. Thereafter, on June 1, 1982, the Defendants Greenawalt and Local 764 filed a motion to amend or vacate the judgment entered on May 21, 1982 accompanied by a memorandum of law in support of the motion. On June 3, 1982, Plaintiffs filed a motion to amend the judgment of May 21, 1982 and for new findings concerning matters discussed in the Court's opinion of May 20, 1982. On June 10, 1982, Plaintiffs filed a brief in reply to the motion of Defendants Greenawalt and Local 764 and on June 15, 1982, the International Brotherhood of Teamsters (In-

ternational) filed its reply to both the motion of Greenawalt and Local 764 and the motion of Plaintiffs. On June 18, 1982, Plaintiffs filed a reply to the brief of International in opposition to Plaintiffs' motion to amend.

The judgment entered May 21, 1982 is in error insofar as it was entered against the Defendants Charles E. Greenawalt, et al. in the amount of $32,592.84. The judgment was awarded on the basis of the matters litigated in Count I of the complaint and should have been entered against International only. In finding that a fee award as to Count I was appropriate against International alone for all of counsels' time spent on the matters involved in Count I, the Court determined that all of the issues litigated under Count I could be said to be subsumed into the action against International stated in Count I. Therefore, the Court determined that counsels' "allocation" of time between the parties concerned with Count I was adequate. Accordingly, the Court will direct that the judgment be amended pursuant to Rule 59 of the Federal Rules of Civil Procedure to reflect that the award as to Count I be entered in favor of Petitioners and against the International only. In effect, this disposes both of parts of the motion of Defendants Greenawalt and Local 764 and of the Plaintiffs' motion.

In their motion, Defendants Greenawalt and Local 764 also take issue with the fact that the Court reviewed the Magistrate's recommendation concerning the matters litigated under Count II, although the Plaintiffs filed no exceptions to those specific recommendations. In the Court's view, this argument lacks merit for several reasons. First, it is not readily apparent that a party's failure to take exceptions to the recommendations of a Magistrate precludes judicial review of a matter. Rule 904.2 of the Rules for the United States District Court for the Middle District of Pennsylvania contains no such prohibition. *See also* English vs. Iron Workers Local 46, 654 F.2d 473, 478 (7th Cir. 1981). Second, the Magis-

trate's recommendation as to Count II confronted the Court with alternatives. In order to determine which alternative outcome recommended was appropriate, the Court necessarily was obligated to review the Magistrate's reasoning. Since only determinations of law and not of fact were involved in the Court's review of the matters considered concerning Count II, the Court sees no impropriety in its failure to adopt the recommendation favored by Defendants. Finally, Defendants Greenawalt and Local 764 argue that the agreement between them and the Plaintiffs was to the effect that no appeals would be taken from the Magistrate's "recommendation." Both because the Magistrate's recommendation contained alternatives and because the language of the agreement providing for decision by the *Court* does not preclude this Court's review, the Court finds Defendants' argument unpersuasive. The motion of Greenawalt and Local 764 to amend the order of May 20, 1982 to provide that Local 764 is not liable to Plaintiffs for counsel fees will be denied.

The Defendants Greenawalt and Local 764 also request that in the alternative to the matters discussed in the preceding paragraph, the Court amend its opinion and order of May 20, 1982 by effecting the settlement agreement between Plaintiffs and Defendants Greenawalt and Local 764. In the Court's view, the settlement between the parties has been effected by the Court's May 20, 1982 determination that Plaintiffs were the prevailing party on Count II and that the matters litigated under Count II conferred a substantial benefit upon the union members. According to the terms of the settlement agreement, these findings trigger the agreement's effect.

Remaining outstanding is the part of the Plaintiffs' motion which requests that the Court make new findings and an appropriate adjustment of its award of attorneys fees and costs for the time spent by attorneys Sims and

Morrison on this matter. In support of the requested findings, Plaintiffs point out that Mr. Sims testified concerning his record keeping practices and that Mr. Morrison's records were maintained on Mr. Levy's calendar by Mr. Levy. In the Court's view, these notations by Mr. Levy do not constitute sufficiently accurate and adequate "concurrent" time records for Mr. Morrison to support an award for the hours claimed by him. *See* Parker v. Secretary of Transportation, No. 81-1965 slip op. at p. 10-11 (D.C. Cir. 1982). Time records kept by one attorney, and modified by that attorney, on behalf of another attorney who has performed the labor being memorialized, are not acceptable. Alternatively, as to Mr. Morrison, the Court notes that the time spent by him in *reviewing and discussing* the work of others involved in the case could be termed non-productive or repetitive work for which no fees should be awarded. *Cf.* King vs. Greenblatt, 560 F.2d 1024, 1027 (1st Cir.), *cert. denied*, 98 S.Ct. 3146 (1977) (no fees need be awarded for duplicative efforts). The Court will refuse to make additional findings concerning Mr. Morrison or an award for his work performed.

With respect to Mr. Sims, Plaintiffs argue that Sims did keep records of his time spent on this case from August 9, 1981 forward and that he testified in support of his part of the fee application at the hearing held before Magistrate Durkin. These assertions are supported by the record and the Court's oversight concerning Mr. Sims's testimony is the result of its confusion as to the point at which the transcript of the hearing held before the Magistrate ended. Mr. Sims testified at the hearing that he noted the hours spent by him in this matter, after a service was performed, in a log. Sims's requests for counsel fees for 37.67 hours at the rate of $80.00 per hour will be granted and the total judgment on Count I will be increased by the amount of $3013.60.

Finally, Plaintiffs request that the Court amend its award to include fees for time spent by Plaintiffs' counsel on the filing of exceptions to the Magistrate's report. This request, Plaintiffs urge, was first made by Plaintiffs in an affidavit by Mr. Levy attached to Plaintiffs' brief in reply to the International's response to the exceptions of the Plaintiffs to the Magistrate's report. In the Court's opinion, Plaintiffs' request for fees for time spent on preparing exceptions to the Magistrate's report and responses to the exceptions of other parties has merit to the extent that it is supported by the affidavit of counsel who performed the services for which fees are sought. Only the affidavit of Mr. Levy has been submitted. It is the Court's view that the affidavit of Mr. Levy in which the hours expended by other attorneys are attested to is inadequate to establish that Petitioners are entitled to fees for those hours. Petitioners' motion to amend the findings and judgment with respect to the hours expended by attorneys other than Levy on activities subsequent to the Magistrate's report will be denied.

Mr. Levy states in his affidavit that he expended 47 hours in preparing the documents presented to the Court subsequent to the filing of the Magistrate's report. In its opinion and order of May 20, 1982, the Court found that an hourly rate of $75.00 was appropriate to apply to Mr. Levy's post-January 1, 1980 work in this case. Accordingly, the Court will amend the judgment of May 20, 1982 to include the amount of $3,525.00 representing the time spent by Mr. Levy on the exceptions of Plaintiffs to the Magistrate's report with regard to Count 1. Further, a schedule of costs incurred by Petitioners subsequent to the filing of the Magistrate's report is appended to Mr. Levy's affidavit and identified therein. Costs are claimed in an additional amount of $207.40 for expenses incurred on matters subsequent to the filing of the Magistrate's report. An award will be made in this amount and the judgment for costs increased accordingly.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Paragraphs 1 and 2 of the order of May 20, 1982 are vacated.

2. The judgment entered May 21, 1982 is stricken.

3. Petitioners, Attorneys Levy, Fox, and Sims are awarded the sum of $37,094.85 in fees for matters litigated in Count I.

4. Petitioners are also awarded $1,243.99 as costs and expenses relating to Count I for a total award of $38,338.84.

5. The Clerk of Court shall enter judgment in this matter in favor of the Petitioners, Attorneys Levy, Fox, and Sims, and against the Count I Defendant, International Brotherhood of Teamsters only, in the total amount of $38,338.84.

6. The motion of the Defendants-Respondents Greenawalt and Local 764 is denied in all other respects.

7. The motion of Petitioners is denied in all other respects.

/s/ Muir
MUIR
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civ. No. 78-1035

JOHN A. PAWLAK, *et al.*,
Plaintiffs

v.

CHARLES E. GREENAWALT, *et al.*,
Defendants

Complaint Filed 10/23/78

(Judge Muir)

JUDGMENT

[June 28, 1982]

The issues having been duly reviewed by the Honorable Malcolm Muir, United States District Judge, and a decision having been rendered this date thereon,

It is Ordered and Adjudged that judgment be and hereby is entered in favor of the Petitioners, Attorneys Levy, Fox, and Sims, and against the Count I Defendant, International Brotherhood of Teamsters only, in the total amount of $38,338.84.

Dated at Williamsport, Pennsylvania, this 28th day of June, 1982.

/s/ Donald R. Berry
DONALD R. BERRY
Clerk of Court

By /s/ Sylvia Lehotsky
Deputy Clerk

Approved:

/s/ Muir
MUIR
U.S. District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3350 and 82-3352

PAWLAK, JOHN A. and STAFFORD, JAMES

v.

GREENAWALT, CHARLES E., LOCAL UNION NO. 764, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS, TEAMSTERS JOINT COUNCIL NO. 53 and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS,

CHARLES E. GREENAWALT and TEAMSTERS LOCAL 764,
Appellants in No. 82-3350

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Appellant in No. 82-3552

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 78-1035)

Argued March 7, 1983

Before: SEITZ, *Chief Judge*,
HIGGINBOTHAM and SLOVITER, *Circuit Judges*

(Filed July 29, 1983)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This case involves the district court's award of attorneys' fees and costs to union members who filed an action to redress their rights under Title I of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531. We are asked to decide whether the district court abused its discretion in awarding attorneys' fees and whether it erred in determining the amount awarded. We will affirm in part and remand in part.

I.

In 1976 John A. Pawlak brought an action against his Union, Local 764 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 764), seeking equitable relief and damages under Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185, for an alleged breach of its duty of fair representation. *Pawlak v. Intern. Broth. of Teamsters, Etc.*, 444 F. Supp. 807, *aff'd mem.*, 571 F.2d 572 (3d Cir. 1978). The district court dismissed Pawlak's action because he failed to exhaust the Union's internal grievance and arbitration procedures as required by Section 301 of LMRA. *Id.* at 812. Relying on Article XIX, § 12(b) of the Union's Constitution which authorizes the Union to recover all costs and expenses it incurs in successfully defending an action brought by one of its members who failed to exhaust internal Union remedies, the Executive Board of Local 764 assessed Pawlak $2,635 in legal expenses.

In January 1978, Pawlak, James A. Stafford and other members of Local 764 proposed amendments to the Union's bylaws. Prior to the April 1978 vote on the proposed amendments, Local President Greenawalt sent a letter to the local rank and file advising the members to reject the proposed amendments. Pawlak and Stafford then requested access to the membership list and union funds to finance a counter-mailing in support of the amendments. The Executive Board refused both requests.

Pawlak and Stafford filed this second action in October 1978 against Local 764, Greenawalt as President of Local 764, the Teamster's Joint Council No. 53[1] and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International). The first of the two-count complaint alleged that the defendants violated LMRDA, 29 U.S.C. § 411(a)(4), by

[1] Joint Council 53 settled with Pawlak and Stafford and was dismissed without prejudice from the complaint.

fining Pawlak $2,635 to recover the expenses Local 764 incurred in defending against his 1976 action. Joint Appendix (J.A.) at 121-24. The second count alleged that Joint Council No. 53, Local 764 and Greenawalt denied Pawlak's and Stafford's right to express their views and to participate in the 1978 bylaw referendum in violation of 29 U.S.C. §§ 411(a)(1) and (a)(2) and 501. J.A. at 124-27. Local 764 counterclaimed against Pawlak for the $2,635 in legal fees it had assessed against him. After Joint Council No. 53 was dismissed from the action, the remaining parties moved for summary judgment.

The district court granted plaintiffs' motion for summary judgment. *Pawlak v. Greenawalt*, 477 F. Supp. 149 (M.D. Pa. 1979), *aff'd*, 628 F.2d 826 (3d Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981). The court declared that Article XIX, § 12(b) of the Union's Constitution violated 29 US.C. § 411(a)(4) because it limited the Union member's right to sue. 477 F. Supp. at 151. The court therefore enjoined defendants from enforcing Article XIX, § 12(b) and from collecting the fine imposed upon Pawlak. *Id.* It also granted plaintiffs' request for an additional order directing the International to publicize this order in its monthly magazine. *Id.*

Count two was resolved in 1979 by a consent order. J.A. at 164-66. Plaintiffs waived their claim for damages, but they were granted equal access to union resources to promote bylaw proposals in 1980. *Id.* at 165. If the Union sent a mailing to rank-and-file members at Union expense, it was required to afford plaintiffs the opportunity at Union expense to insert a letter in the mailing in support of their proposed bylaw amendments. *Id.*

After the district court's judgment was affirmed and the Supreme Court denied certiorari, plaintiffs filed an application for attorneys' fees and costs. They asked for $33,844.35 in attorneys' fees and $1,578.66 in costs for the original action. *Id.* at 3. However the parties to count two entered into a settlement agreement that re-

lieved Greenawalt of all liability for attorneys fees, that relieved Local 764 of all liability for attorneys' fees related to count one, that fixed the amount of fees to be awarded in regard to count two at $4,000 and which limited the issues to be decided by the court with respect to this count to two: whether plaintiffs were the prevailing parties on count two and whether the litigation with respect to count two created a substantial common benefit for the members of Local 764. *Id.* at 349-54. The agreement also stipulated the record upon which these issues were to be decided.

Consequently, the fee application is divisible as to the two counts. Plaintiffs seek an award as to count one from the International. They seek an award as to count two from Local 764 and Charles Greenawalt. They also asked for fees and costs for work on the fee application. *Id.* at 3.

II.

Title I of LMRDA contains no provision for an award of attorneys' fees. However, the Supreme Court recognized a decade ago in *Hall v. Cole*, 412 U.S. 1, 7-9 (1973),[2] that reimbursement of the successful plaintiff's attorneys' fees in an action to vindicate rights under Title I of LMRDA is authorized under the common benefit doctrine affirmed in *Mills v. Electric Auto-Lite*, 396 U.S. 375, 393-97 (1970). This doctrine applies when "the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread

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[2] In Hall v. Cole, a union member brought an action claiming that his right to free speech as secured by LMRDA, 29 U.S.C. § 411(a)(2), was violated when he was expelled from his union for charging that certain actions and policies of the union officers were undemocratic and shortsighted. The Court affirmed the district court's order reinstating him to union membership and awarding him counsel fees.

the costs proportionately among them.'" *Hall v. Cole*, 412 U.S. at 5, *quoting Mills v. Electric Auto-Lite*, 396 U.S. at 393-94.

The Court explained how LMRDA cases could come within the common benefit doctrine. Noting that Title I of LMDRA "was specifically designed to promote the 'full and active participation by the rank and file in the affairs of the union,'" *Hall v. Cole*, 412 U.S. at 7-8, *quoting American Federation of Musicians of the United States and Canada v. Wittstein*, 379 U.S. 171, 182-83 (1964), the Court concluded that a member's vindication of his own right of participation in union affairs "necessarily rendered a substantial service to his union as an institution and to all its members." *Hall v. Cole*, 412 U.S. at 8. The Court also explained that the award of attorneys' fees would be paid out of the union treasury and thus shifted the cost of the litigation to the class benefited by it. The Court held, therefore, "that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees . . . ." *Id.* at 9.

With the exception of local counsel Bruce F. Bratton, plaintiffs' attorneys in this case are employed by a public interest organization, Public Citizen Litigation Group, an arm of Public Citizen, Inc. which is an umbrella organization engaging in a wide variety of public interest activity. J.A. at 3, 31. Public Citizen, Inc. provides the funding for Public Citizen Litigation Group, and it also pays the expenses incurred by attorneys employed by Public Citizen Litigation Group. Because they are salaried employees, plaintiffs' attorneys will not directly receive the attorneys' fees awarded in this case; the award will be turned over to Public Citizen, Inc. *Id.* at 3-4, 32.

The district court referred the application to a magistrate for a report and recommendation. The magistrate

recommended that the fee application be denied in its entirety because plaintiffs' counsel failed to keep adequate time records and to make proper allocations among the two claims and the various parties, *id.* at 85, and because the settlement agreement produced no substantial common benefit. *Id.* at 85-86. In the alternative for count one, the magistrate recommended an award for fees at a reduced hourly rate in the amount of $10,287.50 and costs of $1,036.59 reduced by 25% to $7,815.61 and $744.77 because of plaintiffs' counsels' failure to keep adequate records and to make proper allocations among claims and parties. *Id.* at 85. In the alternative for count two, he recommended an award of fees and costs of $4,000 against Local 764 alone. The magistrate recommended that under no circumstances should fees and costs be awarded for the work performed on the fee application. *Id.*

Based upon a *de novo* review of the record pursuant to 28 U.S.C. § 636(b)(1), the district court rejected the magistrate's recommendations. J.A. at 4. The court reviewed the recommendations as to each count separately. It found that the resolution of count one "unquestionably conferred upon all of the membership of International at the very least the benefit of removing a chill cast upon the rights of all union members to institute court actions in order to vindicate their rights." *Id.* at 7. It also found that the cost of the award would be borne by the Union members who were benefited by the action. Relying on *Hall v. Cole, supra,* the district court concluded that plaintiffs met the threshold requirements of Title 1 of LMRDA, 29 U.S.C. § 412 for an award of attorneys' fees. The court also found that the time "records kept by counsel Levy and Fox are adequate in most respects to support the award of fees for the time reflected in those records and that the time is also adequately allocated by counsel between the counts." J.A. at 9. However, it did deny an award for the time submitted by counsel Bratton,

Sims[3] and Morrison because they failed to keep any time records. *Id.*

The court also rejected the magistrate's recommendation denying the request for fees for time spent on the fee application. Characterizing plaintiffs' action as a vindication of "the civil rights of union members," *id.* at 10, the district court awarded fees for the time spent on the fee application. *Id.* Moreover, it concluded

> that the [requested] hourly rates for Levy and Fox are reasonable rates for attorneys similarly situated geographically and in terms of experience, education, and quality of the work performed.

Id. at 11. These rates are as follows:

Levy (Pre-January 1980)	$65.00
Levy (post-January 1980)	75.00
Fox	90.00

The court thus calculated the amount of the award by multiplying the hours submitted by Levy and Fox by the rates requested:

	Hours	Rate	
Levy (Pre-January 1, 1980)	116.25	$65.00	$ 7,556.25
Levy (Post-January 1, 1980)	245.00	75.00	18,375.00
Fox	62.00	90.00	$ 5,625.00
TOTAL			$31,556.25

Id. at 12. However, it denied plaintiffs' request to increase the fee to reflect its contingent nature or to reflect the quality of counsel's work. *Id.* at 12-13. Finally, it awarded costs of $1,036.59 to reimburse counsel for amounts expended on matters relating to count one. *Id.* at 14.

The court similarly rejected the magistrate's recommendation concerning count two. It found that plaintiffs were the prevailing parties because the settlement agree-

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[3] The district court later acknowledged that it erred with respect to Sims who kept adequate time records. *See infra.* at 14.

ment embraced the relief they sought. *Id.* at 16. It also found that in requiring Union officers to "give union members 'equal time' to express *their* views at union expense," *id.* at 15 (emphasis in original), the settlement agreement conferred a significant common benefit upon plaintiffs and all Union members. *Id.* at 15-16. It therefore awarded attorneys' fees for count two as prescribed by the settlement agreement. *Id.* at 15-16.

The district court later amended its award of $32,592.84 in fees and costs to $38,338.84. *Id.* at 18-25. The court acknowledged that it erred in concluding that counsel Sims failed to keep time records. The record shows that Sims kept time records from August 8, 1981 forward. *Id.* at 22. The court therefore granted Sims' request for counsel fees of $3,013.60 computed at the rate of $80.00 per hour. *Id.* at 23. The court also awarded an additional $3,525.00 for time spent by counsel Levy in regard to plaintiffs' exceptions to the magistrate's report concerning count one. *Id.* at 22-24. The court thus awarded a total of $38,338.84 in attorneys' fees and costs.

The named defendants now appeal from the district court's orders. We are asked to decide if the district court abused its discretion in awarding attorneys' fees and costs to the named plaintiffs with respect to the underlying action. We are also asked to determine if the district court erred in awarding attorneys' fees and costs for the work performed on the application for fees and costs.

III.

The standard of review of a district court's award of attorneys' fees was enunciated by this court in *Lindy Bros. Bldrs., Inc. of Phila. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 166 (3d Cir. 1973) (*Lindy I*) and affirmed in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115-116 (3d Cir. 1976) (*Lindy II*). The court held in *Lindy I*:

> In awarding attorneys' fees, the district judge is empowered to exercise his informed discretion, and any successful challenge to his determination must show that the judge abused that discretion . . . failure to adhere to proper standards and to follow appropriate procedures would constitute abuse of the district court's discretion to award attorneys' fees.

Lindy I, 487 F.2d at 166. In *Lindy II*, we declared that " 'if the district court has applied the correct criteria to the facts of the case, then, it is fair to say that we will ordinarily defer to its exercise of discretion.' " *Lindy II*, 540 F.2d at 116, *quoting Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.) (in banc), *cert. denied*, 419 U.S. 885 (1974). The proper standards and appropriate procedures to be followed by the district court in determining the amount of fees to be awarded were articulated in *Lindy I*: the number of hours spent on the litigation; the nature of the services involved; the value of the attorneys' time based on a reasonable hourly rate; the contingent nature of success in the litigation; and "the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing the amount to which the court has found the attorney reasonably entitled." 487 F.2d at 168. The following factors are to be considered in evaluating the quality of the attorneys' work: "the complexity and novelty of the issues presented, the quality of the work that the judge has been able to observe, and the amount of the recovery obtained." *Id.* These standards and procedures are summarized in *Lindy II*, 540 F.2d at 108.

The district court "applied the correct criteria to the facts of the case." *Lindy II*, 540 F.2d at 116. Therefore, we may reverse the lower court only if we find that its decision was "irrational," *id.* at 115, or was based upon an erroneous finding of fact. *Id.* at 116. Appellants contend that the court's findings of fact were clearly erroneous because the time records lacked sufficient detail to

provide the bases for a judicial determination of the exact time spent, the specific nature of the services used, or of an allocation of time between the counts and among the various parties.

On some of these issues, however, appellants demand a degree of detail in the time records that is not required by law. We have said that in determining the time spent and the nature of legal services employed "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted . . . ." *Lindy I*, 487 F.2d at 167. Yet we do require "some fairly definite information as to the hours devoted to various general activities . . . ." *Id.* This requirement of specificity is intended to permit the district court to determine if the hours claimed are reasonable for the work performed.

The court's focus in assessing the adequacy of submitted documentation, then, is whether the documentation permits the court to determine if the claimed fees are reasonable. This point was recently emphasized by the Court of Appeals for the District of Columbia in reversing a district court's denial of attorneys' fees for lack of adequate documentation. *Jordan v. United States Dep't of Justice*, No. 81-1380, Slip Op. (D.C. Cir. Oct. 5, 1982). That court declared:

> Total denial of requested fees as a purely prophylactic measure, however, is a stringent sanction, to be reserved for only the most severe of situations, and appropriately invoked only in very limited circumstances. Outright denial may be justified when the party seeking fees declines to proffer any substantiation in the form of affidavits, timesheets or the like, or when the application is grossly and intolerably exaggerated, or manifestly filed in bad faith.

Id. at 9. (Footnotes omitted.) Although *Jordan* involved a fee application by a successful litigant under the Free-

dom of Information Act, 5 U.S.C. § 552, its principle is similarly applicable in a case such as the one before us where a fee application is considered under the court's equitable power.

On the basis of the record before us, we cannot say that the district court abused its discretion in its award of attorneys' fees. The time records that served as the bases of the reconstructed time summaries admittedly were not exemplary, *see* J.A. Vol. III. Still, our review of them leads us to conclude that the district court was not clearly erroneous or irrational in finding that these records were "adequate in most respects to support the award of fees for the time reflected in those records." J.A. at 9.

International challenges the district court's allocation to it alone of all of the time spent on count one and its allocation of unspecified time equally to each count. These allocations were the product of the settlement reached between appellees Pawlak and Stafford and appellants Greenawalt and Local 764. *See infra* at 5. International was not a party to this agreement.

International argues that it should not be held liable for attorneys' fees relating to count one. It claims it was not a party to the litigation that gave rise to Pawlak's claim for attorneys' fees as to that count.

This assertion is incorrect. Not only was the International a named defendant in the earlier actions, it actively participated in them and its counsel wrote all of the briefs on appeal. *Pawlak v. Intern. Broth. of Teamsters, Etc.*, 444 F. Supp. at 809; *Pawlak v. Greenawalt*, 477 F. Supp. at 150; J.A. at 104. Judgments in these earlier actions and on appeal were entered against International as they were against the other defendants. Moreover, Local 764 and Greenawalt were agents of International and acted under authority of the International's constitution. International cannot validly show

that it was not a party to the litigation that gave rise to Pawlak's petition for attorneys' fees.

Nevertheless, this Court has held that, in certain attorneys' fees petitions involving various defendants, the district court must allocate among them the time chargeable to each defendant. *Baughman v. Wilson Freight Forwarding Company*, 583 F.2d 1208, 1214 (3d Cir. 1978). In *Baughman* we declared:

> We do not believe that a defendant may be required to compensate a plaintiff for attorney hours devoted to the case against other defendants who settle or who are found not to be liable.

Id. The same case also holds that the hours chargeable to the claims against other defendants are chargeable to a specific defendant if "plaintiff can establish that such hours also were fairly devoted to the prosecution of the claim against" that specific defendant. *Id.* at 1215.

In addition, we have also rejected the simple allocation of liability for attorneys' fees as a percentage among claims. In *Hughes v. Repko*, 578 F.2d 483, 486 (3d Cir. 1978), we set aside a district court's judgment which reduced by two-thirds the lodestar it awarded to plaintiffs who prevailed on only one of the three counts of their complaint. The district court erred in determining the attorneys' fee award without having made a finding as to the time spent on the claim on which plaintiffs prevailed. We noted

> that there is no necessary relationship between the number of claims and contentions presented in a lawsuit and the lawyer time spent on each. Consequently, the approach adopted by the district court does not have a rational basis to commend it.

Id. We held that the district court's automatic reduction of the lodestar by two-thirds was legally impermissible.

The district court failed to allocate time spent by appellants' counsel as required by *Baughman* and *Repko*. Therefore, the district court erred in allocating all of the time spent on count one to International and in allocating unspecified time equally to each count. On remand the district court should determine the number of attorney hours attributable to each count. Of the time allocable to count one, the district court should determine the number of hours chargeable to International. We emphasize that Pawlak bears the burden of proving the number of hours allocable to count one and chargeable to International.

Appellants also challenge the hourly rates that the district court determined were the proper rates to be applied to the hours worked in computing the lodestar. They claim that the court's determination was based on the undocumented assertions of appellees' counsel concerning the hourly rates prevailing in the community. They insist that these assertions were insufficient bases upon which a determination could be made. The district court, however, found that the rates submitted by appellants' counsel were "reasonable rates for attorneys similarly situated geographically and in terms of experience, education, and quality of the work performed." *Id.* at 11.

This court has determined that the value of an attorney's services is generally measured by his billing rate. *Lindy I*, 487 F.2d at 167. When an attorney is salaried, as are plaintiffs' attorneys, and does not have an hourly billing rate, this court has held that, "[t]o the extent salary levels are relevant [to the determination of reasonable attorneys' fees], the appropriate referent would be comparable salaries earned by private attorneys with similar experience and expertise in equivalent litigation." *Rodriguez v. Taylor*, 569 F.2d 1231, 1248 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

The district court was thus obliged "to determine the reasonable hourly rate 'prevailing in the community for

similar work.'" *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1324 (D.C. Cir. 1982), *quoting Copeland v. Marshall*, 641 F.2d 880, 892 (D.C. Cir. 1980) (in banc). In making this determination, the court was required to consider such factors as the expertise, experience, position and reputation of the attorneys involved. *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d at 1216-17. The district court considered these factors in addition to counsels' education and the quality of counsels' work in making its determination. J.A. at 11. It based its determination on its "consideration of the undisputed facts of record in this matter together with the testimony given by [p]laintiffs' counsel and their affidavits submitted in support of the application for attorneys' fees." *Id.* at 11. Because the record supports the district court's determination, we find that it was not clearly erroneous in its determination that the requested rates are reasonable hourly rates prevailing in the community for similar work. *National Ass'n of Concerned Veterans v. Secretary of Defense, supra.*

IV.

As to count two, we hold that appellees were the prevailing parties and that their settlement conferred a substantial common benefit on Union members.

We find that the Consent Order contributed to a fair process in bylaws referenda. Its impact transcends the 1980 election, for it now stands as a precedent for subsequent bylaw referenda. Therefore, the benefit exists even though appellees' 1980 bylaws proposals were defeated, and even though they were unable to use a Union-financed mailing of their views because Union officers decided not to send a mailing prior to the 1980 election. We view the Consent Order as a vindication of appellees' right to free speech guaranteed by Title I of LMRDA which "necessarily rendered a substantial service to [their] union as an institution and to all of its members." *Hall v. Cole*, 412 U.S. at 8.

Appellants also argue that the Consent Order was personal because appellees were motivated by their desire for elective office, and the Consent Order improperly would have advanced their election goals. They insist that this motivation should preclude a judicial finding that their action conferred a substantial common benefit upon Union members.

The Supreme Court rejected a similar objection to an award of attorneys' fees. In *Hall v. Cole, supra*, a union claimed that a union member's application for attorneys' fees should be denied because he was motivated in bringing an action to vindicate his right to free speech under Title I, LMRDA, in part, by his desire to gain elective office. The Supreme Court rejected the union's theory. It held that "Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union. . . ." *Id.* at 14. It therefore granted attorneys' fees notwithstanding the personal election goals of the union member "because the litigation confers substantial benefits on an ascertainable class of beneficiaries." *Id.* at 15.

In this case, as in *Hall v. Cole, supra*, a substantial benefit was conferred upon Union members. In vindicating their rights of freedom of speech and of full and active participation in Union affairs, appellees in this case, as the respondent in *Hall v. Cole*, dispelled the "chill" cast upon the rights of all Union members and contributed to the preservation of union democracy. The Supreme Court held that those achievements, notwithstanding personal political motivations, "necessarily rendered a substantial service to [their] union as an institution and to all its members." *Id.* at 8. Consequently, the substantial benefit this litigation conferred upon Union members by vindicating their civil rights under Title I of LMRDA is not negated by appellees' desire for elective office. Rather, they are mutually beneficial. Their personal ambitions in bringing the action in no way im-

pedes the court from granting appellees' petition for attorneys' fees for work performed on count two. Finding that appellees were prevailing parties in count two and that the Consent Order conferred a substantial benefit on Union members, we will affirm the district court's award of attorneys' fees for the underlying litigation.

V.

The final issue before us is one of first impression. We are asked whether the district court erred as a matter of law in awarding attorneys' fees for work performed on the application for attorneys' fees in this nonstatutory common benefit action. We conclude that the district court did not err.

Appellants argue that in nonstatutory common benefit actions fee awards are not permitted for time spent litigating the fee application. Their rationale relies on the common fund doctrine, which appellants claim is an identical doctrine, in which the successful plaintiff may recover only attorneys' fees and costs incurred in creating, preserving or increasing the common fund. For the reasons stated below, we reject this rationale and hold that common benefit actions brought to vindicate civil rights conferred by Title I of LMRDA are distinguishable from common fund actions.

Under the common fund theory, fees and costs may be awarded to a party who creates, preserves or protects a fund or property for the benefit of others in addition to himself. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). The fees and costs are paid out of the fund or property because the party seeking compensation benefited others who otherwise would unfairly enjoy the benefit without having shared the cost of acquiring the benefit. To avoid such unfairness, courts permit the costs to be shared by the class of individuals benefited by the action. *Id.*

Attorneys' fees and costs are not awarded for time spent on the fee application in common fund cases because the common fund or property is not benefited thereby. This court has held that the action for "attorneys' fees under the equitable fund doctrine belongs to the attorney." *Lindy I*, 487 F.2d at 165. The action benefits the attorney but not the fund because it does "not create, increase, protect or preserve it," *Lindy II*, 540 F.2d at 111; rather, it would actually deplete the fund and, therefore, the benefit to plaintiff and the benefited class of individuals because the award would be paid out of the fund. We have therefore denied the award of fees and costs for time spent litigating a fee application under the common fund doctrine because the attorneys' interests in the fee application litigation are in conflict with those of the individuals benefited by the common fund. *Id.* The rationale supporting the award of attorneys' fees for the underlying litigation thus precludes an award of fees for the fee application in common fund actions.

The United States District Court for the District of Delaware recently applied this rationale in denying fees and costs for a fee application in a common benefit doctrine action. *Colpo v. General Teamsters Local Union 326 of the International Brotherhood of Teamsters*, 531 F. Supp. 573 (D.Del. 1982). The litigation was brought by a union member against his union claiming that the union wrongly disqualified him as a candidate for president of his local because he was delinquent in dues payment. The court found that the union violated the voting and candidacy rights of the union members under 29 U.S.C. § 481(e).

The district court awarded petitioner counsel fees for work performed on the litigation, but denied counsel's request for attorneys' fees for work performed on the fee application. *Id.* at 577. The district court reasoned that the plaintiff

> is entitled to collect fees from the treasury of Local 326 only to prevent unjust enrichment of the Local's membership which has enjoyed a legal victory at [plaintiff's] expense.

Id. The court asserted that "[i]n such 'benefit' conferred cases, the Third Circuit has denied recovery for time spent in litigating a fee application." *Id., citing Lindy II*, 540 F.2d at 111. The district court declared:

> The theory is that while counsel's effort in securing a judgment conferred a benefit on the group who should share the expense of securing it, once the merits are resolved, the group receives no additional benefits from the attorney's effort to secure a counsel fee award. Indeed, at that point, "the attorney's interest becomes adverse to the interest of the class which he represents."

Id., quoting Prandini v. National Tea Co., 585 F.2d 47, 53 (3d Cir. 1978). The district court thus applied the common fund theory to the common benefit theory in denying attorneys' fees for the time spent on the fee application.

Another district court reached the opposite result under a different rationale in an earlier case. *Cole v. Hall*, 376 F. Supp. 460 (E.D.N.Y. 1974). Successful plaintiffs in the seminal LMRDA attorneys' fee case, *Hall v. Cole, supra*, brought an action for supplementary attorneys' fees for services, *inter alia*, rendered in preparing the appeal to the Supreme Court pursuant to the application for attorneys' fees. The district court granted attorneys' fees for time spent litigating the fee application with the following rationale:

> The rights of union members granted under Title I of the LMRDA would be valueless without the means to vindicate them. The services rendered by plaintiff's counsel established the right of union members to reasonable counsel fees in prosecution of claims

> protecting their Title I rights. In essence, plaintiff's counsel served as a private attorney general. The challenge to his fee is a matter of public concern and it is in the public interest that he be compensated for the services rendered in the protection of his fee.

Cole v. Hall, 376 F. Supp. at 462. (Footnote omitted.)

That district court implicitly distinguished the common fund and the common benefit theories. The justification for the award of attorneys' fees in that common benefit action arose from the protection afforded to the union members' civil rights under Title I of LMRDA. There was no fund granted or preserved by the litigation out of which the attorneys' fees were to be paid. Therefore, the award of attorneys' fees for the time spent in litigating the fee application did not present the conflict of interest between the attorney's action for fees and the individuals benefited by the original litigation. Rather, compensating the attorney for the time spent in litigating his fee, as the court noted, serves the public interest and the interests of the union members whose Title I rights were vindicated.

Ironically, the theory of *Cole v. Hall*, *supra*, finds support in the case relied on as authority in *Colpo v. General Teamsters Local 326 of the International Brotherhood of Teamsters*, *supra*, namely, *Prandini v. National Tea Co.*, *supra*. In *Prandini*, plaintiffs were successful in bringing a Title VII class action based on sex discrimination in employment. Attorneys' fees were awarded under 42 U.S.C. § 2000e-5. Distinguishing *Prandini* from equitable common fund cases such as *Lindy II*, *supra*, this court awarded plaintiff's counsel fees for time spent litigating the fee application.

In *Prandini*, we distinguished actions to vindicate statutorily conferred rights from equitable common fund actions. We distinguished them on two grounds. First, the attorneys' fee award in *Prandini* was authorized by

the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988. The second ground is more important to the instant case because of the theory under which the court awarded fees for the fee application. We said:

> Here, the attorneys' fees do not come out of, nor do they reduce, the plaintiffs' recovery. Hence, the award in this case is unlike a common fund award, which does reduce the plaintiffs' recovery.

Prandini v. National Tea Co., 585 F.2d at 53; *accord*, *Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980); *Gagne v. Maher*, 594 F.2d 336, 343-44 (2d Cir. 1979), *aff'd* 448 U.S. 122 (1980); *Johnson v. State of Mississippi*, 606 F.2d 635, 637-39 (5th Cir. 1979); *Weisenberger v. Heucker*, 593 F.2d 49, 53-54 (6th Cir. 1979), *cert. denied*, 444 U.S. 880 (1979); *Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977). Similarly, in a common benefit action in which the benefit is the vindication of statutorily-conferred rights and not a fund that would be depleted by an award of attorneys' fees, the conflict of interest between the attorney and the class which he represents that precludes compensation for time spent in litigating the fee application in a common fund action is not present. The creation or preservation of a fund is not the justification for the fee award; rather, as in a Title VII action it is the vindication of the class' statutory rights that is the common benefit conferred on the class that justifies an award of attorneys' fees. Moreover, the plaintiffs' recovery is not depleted because the damages award is not the source of payment of counsels' fees. Rather, it is the defendants' treasury that is depleted. Thus, a common benefit action is distinguishable from a common fund action because any fees not awarded to counsel

> will not be paid to the plaintiffs to augment their settlement fund, as is the case in the normal common fund situation. *See Lindy II.* Rather, any such ex-

> cess will be returned to the defendant National. . . . It is this fact which ultimately makes this case distinguishable from *Lindy II*, and requires a different result.

Prandini v. National Tea Co., 585 F.2d at 53. (Footnote omitted.)

This theory was recently adopted by the Eighth Circuit in awarding fees for time spent on the fee application in a common fund type class action for securities fraud. *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1314-15 (8th Cir. 1981). The parties reached a settlement agreement that provided for an award of attorneys' fees, none of which would be deducted from the class' recovery. Focusing on the benefit conferred upon the class and noting that attorneys' fees would not be deducted from the plaintiff class' recovery, the court relied on Prandini in awarding fees for time so spent on the fee application. Such awards are justified, the court declared, "because 'the fees are not paid out of the plaintiffs' recovery,' and thus do not diminish their benefits." *Jorstad v. IDS Realty Trust*, 643 F.2d at 1314, *quoting Prandini v. National Tea Co.*, 585 F.2d at 52-53.

The same considerations are present in the instant case. As in *Prandini* and cases involving statutorily authorized fees for actions vindicating statutorily conferred civil rights, the fees in this case "are not paid out of the plaintiffs' recovery, and the attorney in seeking his fee is not acting in any sense adversely to the plaintiffs." *Prandini v. National Tea Co.*, 585 F.2d at 53. We conclude that this case is analogous to one involving a statutorily authorized attorneys' fee award. Therefore, in this case, as in *Prandini*,

> the considerations of Lindy II and the equitable fund cases do not apply . . . . Hence, the time expended by attorneys in obtaining a reasonable fee is

> justifiably included in the attorneys' fee application, and in the court's fee award.

Id.

We noted in *Prandini* an important policy consideration for this result: if attorneys are required to litigate for their fees but are not compensated for the time spent on such litigation, their effective rates will be reduced correspondingly. Attorneys "may become wary about taking Title VII cases, civil rights cases, or other cases for which attorneys' fees are statutorily authorized." *Id.*

This policy consideration was influential in our recent denial of attorneys' fees for time spent preparing an attorneys' fee application. *Shadis v. Beal*, 703 F.2d 71 (3d Cir. 1983). In *Shadis*, an attorney retained the services of a law firm to litigate her petition for attorneys' fees under the Civil Rights Attorneys' Fees Award Act. Although we granted attorneys' fees to the law firm for the time it spent litigating the attorney's application for attorneys' fees on the underlying civil rights action, we denied attorneys' fees to the law firm for the time it spent in preparing its own fee application. We reached this result by applying the principles of *Prandini*:

> Since under Prandini [the attorney] would have been entitled to reasonable fees for preparing her own fee petition, the [law firm] should be recompensed for the effort they made in her stead. To hold otherwise would be effectively to deny such fees to a prevailing attorney if, for some extraordinary reason, the attorney is unable to prosecute her own fee application.

Id. at 73. Thus, we concluded that the policy of the Civil Rights Attorneys' Fees Awards Act, to encourage attorneys to vindicate civil rights and Congressional policies, would "be furthered by granting the [law] firm its fees only to the extent that it stands in [the attorney's] shoes." *Id.*

The instant case does not present the additional legal expenses caused by original counsel hiring her own attorney to litigate her fee application. Here, we are presented only with the original attorneys' application for fees to compensate them for time spent in litigating their fee application which *Shadis* and *Prandini* hold is permissible under the Civil Rights Attorneys' Fees Awards Act in vindicating civil rights under Title VII. We belive that the policy considerations leading to such awards in vindicating Title VII rights are equally applicable to cases such as the instant case where counsel fees are authorized under the court's equitable powers to compensate successful plaintiffs in a common benefit action in which the benefit consists of the vindication of the class' rights conferred by Title I of LMRDA. In such cases, we hold that the district court may award attorneys' fees for time spent litigating the fee application.

For the foregoing reasons, the judgment of the district court will be affirmed in part and the case remanded in part for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-3350 & 82-3352

PAWLAK, JOHN A. and STAFFORD, JAMES

vs.

GREENAWALT, CHARLES E., LOCAL UNION NO. 764, TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, and HELPERS, TEAMSTERS JOINT COUNCIL NO. 53 and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS

CHARLES GREENAWALT and TEAMSTERS LOCAL 764,
Appellants in No. 82-3350

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Appellant in No. 82-3352

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-1035)

Present: SEITZ, *Chief Judge*;
HIGGINBOTHAM and SLOVITER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on March 7, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court, entered June 28, 1982, be, and the same is hereby affirmed as to the awarding of attorneys' fees; however, the cause is remanded for redetermination of the proper allocation of attorneys' fees with respect to each count of the complaint and to the respective parties. All of the above in accordance with the opinion of this Court. Costs taxed against appellants.

Attest:

/s/ Sally Mrvos
Clerk

July 29, 1983